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No.

In the Supreme Court

OF THE

United States

October Term, 1984

DEL MONTE CORPORATION, A New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioners,

vs.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Court of Appeals err in holding, contrary to rulings of the Fifth, Seventh, and Eleventh Circuits, that a procedural violation by an ERISA plan administrator which causes an employee no damage may give rise to a cause of action for benefits to which the employee would not otherwise be entitled under the plan?

(2) Where an ERISA severance plan provides for benefits when an employee's "position" is "eliminated," may the plan administrator reasonable interpret the plan as not requiring payment of benefits when a business is sold as a unit and employment continues uninterrupted with the successor employer which has obligated itself to provide comparable benefits?

(3) Did the Court of Appeals err when it held, contrary to decisions of the Seventh and Eleventh Circuits, that a plan administrator's interpretation of an ERISA plan meets the "arbitrary and capricious" standard of review only if that interpretation is *required* by—as opposed to being reasonably permissible under—the language of the plan?[1]

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[1] The parties are named in the title of this petition. Other than the named parties, there exist no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates of any corporate party.

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OPINIONS BELOW

The opinion of the district court is unreported, and it is printed in Appendix A. The first opinion of the Court of Appeals is unreported, and it is printed in Appendix B. The amended opinion of the Court of Appeals is reported (748 F.2d 1348), and it is printed in Appendix C. The order on denial of rehearing and rehearing en banc is printed in Appendix D.

JURISDICTION

The amended opinion of the Court of Appeals for the Ninth Circuit was filed and entered on March 5, 1985 (Appx. C), and

its order denying rehearing was filed and entered on May 13, 1985 (Appx. D). This Court has jurisdiction pursuant to section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and the Code of Federal Regulations. Pertinent portions of these (29 U.S.C. §§ 1001, 1022, 1024, 1102, 1103, 1104, 1132, 1144; 29 C.F.R. §§ 2510.3-1(a)(3), 2520.102-3, 2560.503-1) are set forth in Appendix E.

STATEMENT OF THE CASE

A. Statement of the facts

1. *The severance plan:* Granny Goose was a wholly-owned subsidiary of petitioner Del Monte Corporation, whose salaried, nonunion employees were eligible for coverage under certain pension and benefit plans, including Del Monte's voluntarily established and unfunded severance plan (ER 144, 178, 185, 187, 223, 457).[2] The objective of that severance plan was stated as follows:

> "This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for *employees whose positions are eliminated as a result of* reorganization, consolidation, or *elimination of operations to which they have been assigned* and for whom appropriate alternative employment opportunities are unavailable within the Corporation" (ER 238) (emphasis added).

2. *Application of the plan:* The intent of the plan was to provide severance benefits to employees who lost their jobs as a result of layoffs or plant closures (ER 236), and Del Monte's consistent practice has been to pay severance benefits to individuals whose positions are eliminated (ER 236). Between 1975 and the end of 1980 (when Granny Goose was sold), eight wholly-owned subsidiaries or operations were sold by Del Monte as going

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[2] Citations herein are to the excerpt of record (ER) and the clerk's record (CR) in the court below.

concerns (ER 236). In none of those instances were severance benefits paid to employees who continued their employment with the purchaser (ER 189, 236).

3. *The sale of Granny Goose:* Del Monte sold Granny Goose to a group of investors, with the purchase effective December 13, 1980 (ER 190, 453). Every salaried, nonunion employee on the Granny Goose payroll as of December 12, 1980 was continued in employment as of December 13, 1980, with the exception of four persons who previously had been Del Monte employees and who were offered employment with Del Monte (ER 138, 182-183, 210-211, 230). Plaintiffs all testified that they continued working at the same rates of pay, with the same basic responsibilities, after the sale (ER 132-135, 142-145, 176-177, 202-204, 219-221). There is no evidence that any Granny Goose employee lost even one day of pay because of the sale (ER 227).

4. *Employee knowledge of the severance plan:* Plaintiffs were aware that a severance plan existed and that there was a chart and a formula used to determine the amount of severance benefits (ER 381-382, 394, 429-430, 450). Although the written severance plan was not generally circulated to employees (ER 457), when the plan was read at depositions, plaintiffs testified that it stated the terms of the severance policy as they understood them (ER 397, 430, 434-435, 470).

Plaintiffs were aware that other employees had received benefits when they became unemployed (ER 137, 188, 228, 447, 465). Plaintiffs also were aware that subsidiaries other than Granny Goose had been sold as going concerns (ER 137), and they knew of no employee, whose employment continued, who had received severance benefits as a result of such a sale (ER 136, 229, 448, 469, 610, 611). Prior to the sale of Granny Goose, Del Monte advised plaintiffs, and it was generally known, that severance benefits would not be paid (ER 475-476, 482, 594).

5. *Continuation of employee benefits:* Under the contract of sale, the new owners of Granny Goose were obligated to establish "an employee welfare benefit program which is reasonably comparable to that presently in effect" (ER 196-197, 527), and they agreed to credit the employees with their accrued seniority (ER

195, 526). Accordingly, the new owners established, effective as of the date of sale, employee welfare benefit plans which were comparable to the Del Monte plans (ER 197).[3] Under the new severance plan, Granny Goose pays severance benefits to involuntarily terminated employees according to a formula which uses the employees' *original employment date* with Granny Goose (ER 180). Pursuant to this formula, one employee who left Granny Goose after the sale received approximately $26,000; another received approximately $13,000 (ER 181). No salaried nonunion employee of Granny Goose involuntarily terminated since December 13, 1980, has failed to receive severance benefits (ER 181).

B. The proceedings below.

Plaintiffs brought a purported class action against Del Monte in state court, contending that the sale itself entitled them to severance benefits even though their employment with Granny Goose continued (ER 1-13). The case was removed (28 U.S.C. § 1441) to federal court under ERISA (29 U.S.C. § 1132(e)(1)). After discovery, the district court granted Del Monte's motion for summary judgment, determining that, on the uncontroverted evidence, "the defendants' decision to deny the plaintiffs severance pay was not arbitrary or capricious, but was fully within the scope of the plan" (Appx. A, p. A3).

The Ninth Circuit reversed, holding that a procedural violation of ERISA may "work a substantive harm" even in the absence of monetary damage, that Del Monte's failure to comply with ERISA's procedural requirements of disclosure and reporting was "arbitrary and capricious," and that such "continuing procedural violations" were "highly probative" of whether a particular decision to deny benefits was itself arbitrary and capricious (Appx. C,

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[3] The Court of Appeals stated that Granny Goose employees retained "similar responsibilities and similar rates of pay, but somewhat different benefits" (Appx. C, p. A23). Although plaintiffs had made some conclusionary assertions that "differences" existed between the benefit plans, there was no evidence of such purported "differences." Moreover, when Del Monte sought discovery on the claim of "differences," plaintiffs blocked it as irrelevant (ER 209, 213-214, 450; C.R. 6).

pp. A28-A29). Applying a standard of review under which interpretation of a plan would be arbitrary and capricious as a matter of law unless that interpretation is *required* by the language of the plan, the court concluded that the denial of benefits was not "required" under the Del Monte plan (Appx. C, p. A29). Del Monte's consistent interpretation and application of the plan so as to deny benefits in similar past cases where the employment positions continued was held irrelevant because it had been "secret" (Appx. C, pp. A31-A32).

On May 13, 1985, the Court of Appeals denied a petition for rehearing; upon request by a judge in active service, a vote was taken on the suggestion for rehearing en banc, but a majority failed to vote for an en banc rehearing (Appx. D).

REASONS FOR GRANTING CERTIORARI

This case presents important questions regarding the interpretation and application of ERISA benefit plans. For a variety of reasons, not the least of which is the fact that ERISA is a relatively complex piece of litigation with rapidly changing case law and regulations, a number of employers have not fully complied with its procedural provisions. Accordingly, the courts are being required to determine how to treat those procedural violations. Until the decision of the Ninth Circuit, every court that passed upon the question had held that a procedural violation of ERISA gave rise to no cause of action for damages, absent some economic harm caused by the violation. The Ninth Circuit, however, has held that a procedural violation may itself cause a "substantive harm" and be the basis for an award of benefits *to which the employee would not otherwise be entitled.*

The decision of the Ninth Circuit also cries out for review because of its novel requirement that employees must be paid severance benefits when a business is sold as a unit, *even if the employees retain their positions after the sale.* Other employers have, as did the employer here, conditioned payment of severance benefits upon the termination of the *employment position.* If a business is sold intact as a unit and employment continues with the new employer (who in this case has established a similar

severance plan), no benefits are paid. Courts have approved such interpretations of severance plans as consistent with the policy against double recovery and ERISA's policy of keeping the costs of plans reasonable. Only the Ninth Circuit has found fault with such an interpretation, holding that an administrator's interpretation of an ERISA plan cannot be justified unless it is *required* by the language of the plan. This holding is in direct conflict with decisions of other Courts of Appeals under the "arbitrary and capricious" standard which uphold reasonable interpretations, even if not required by the plan's language.

Only this Court can put to rest the uncertainties created by the opinion of the Ninth Circuit, which has placed itself in direct conflict with other cases on point in this rapidly developing area of the law.

I

IN HOLDING THAT A PROCEDURAL VIOLATION MAY BE THE BASIS FOR AN AWARD OF BENEFITS TO WHICH AN EMPLOYEE WOULD NOT OTHERWISE BE ENTITLED, THE NINTH CIRCUIT HAS SANCTIONED A WINDFALL FOR EMPLOYEES AND PUT ITSELF IN CONFLICT WITH OTHER COURTS OF APPEALS

The Court of Appeals has held that an employee, relying upon a *procedural* violation of ERISA, may sue for damages and recovery of an award of benefits *even though that employee would not otherwise be entitled to the claimed benefits.* The court reached this startling result through sheer legal legerdemain. According to the court, a procedural violation may work "a substantive harm" and therefore, if plan administration is "riddled" with such violations, the denial of benefits may be arbitrary and capricious as a matter of law (Appx. C, pp. A28, A35). Although the court stopped short of holding that the denial of benefits in such a case would always be arbitrary and capricious, it nonetheless has opened a wide door by inviting suits for damages

each and every time that any employee is denied benefits and believes that he or she can allege a procedural violation.

In doing so, the Ninth Circuit lost sight of a basic principle of jurisprudence; it created a "remedy" where there exists no harm. Prior to the decision of the Ninth Circuit, courts had consistently—and sensibly—held that a procedural violation of ERISA may be the basis of a cause of action *if* it causes economic injury to the employee (*Wolfe v. J.C. Penney Co., Inc.*, (7 Cir. 1983) 710 F.2d 388, 393; *Paris v. Profit Sharing Plan, Etc.* (5 Cir. 1981) 637 F.2d 357, 362; *Petrella v. NL Industries, Inc.* (D.N.J. 1982) 529 F.Supp. 1357, 1370 ("There is no indication that Congress intended to create a cause of action for compensatory damages for failure to disclose"); *Grossmuller v. International Union, U.A.W.* (E.D.Pa. 1981) 511 F.Supp. 709, 710).[4]

The precise question before the Ninth Circuit has been faced recently by two other Circuits—and they have reached conclusions diametrically opposed to that of the Ninth Circuit. In *Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1518, the employer clearly had failed to comply with ERISA. It had denied that its severance plan was an ERISA welfare benefit plan, and the summary did not disclose that benefits would not be paid when a business was sold as a unit (759 F.2d 1521). In response to the plaintiff-employees' argument that these procedural violations rendered the usual standard of review inapplicable, the Eleventh Circuit declared:

> "[T]here is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review" (759 F.2d 1521).

Unlike the Ninth Circuit, the Eleventh Circuit did not hold, nor even suggest, that the procedural violations had resulted in

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[4] Indeed, the Ninth Circuit itself previously had indicated that a cause of action would lie upon a procedural violation of ERISA "assuming, of course, that the breach causes [the employee] some injury" (*Russell v. Mass. Mut. Life Ins. Co.* (9 Cir. 1983) 722 F.2d 482, 488, certiorari granted (1984) 52 U.S. Law Week 3235-3236).

some sort of amorphous "substantive injury" which in turn entitled employees to an award of benefits. To the contrary, the Eleventh Circuit stated that the *sole* issue in application of the arbitrary and capricious test was whether the decision " 'was made rationally and in good faith—not whether it was right' " (759 F.2d 1522).[5]

The same result was reached by the Seventh Circuit in a similar situation. In *Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, the severance plan "was an internal policy statement" not generally circulated to employees (712 F.2d 1210, fn. 1, 1212). The court did not hold that such a procedural violation entitled employees to any extraordinary remedy, such as that created by the Ninth Circuit. Rather, it adhered to the established interpretation of the arbitrary and capricious test under which the administrator's decision prevails unless "it was 'arbitrary, fraudulent, or in bad faith' " (712 F.2d 1211).[6]

What the Ninth Circuit has done here is to create a legally-sanctioned form of "double dipping." Plaintiffs have not, and they cannot, point to any injury *caused* by the procedural violations in

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[5] Ironically, the Eleventh Circuit cited the decision below for the proposition that, "in a case where ERISA's provisions were 'flouted' in a 'wholesale and flagrant manner,' the arbitrary and capricious standard was still applied" (759 F.2d 1521). As discussed, however, the opinion of the Ninth Circuit goes much further, holding that the procedural violations themselves may give rise to a cause of action even in the absence of economic harm.

[6] The Ninth Circuit purported to distinguish this decision on the ground that the Seventh Circuit had "accepted the district court's determination" of employer good faith and therefore "had no occasion to determine whether that plan was infected with arbitrary and capricious administration" (Appx. C, p. A29, fn. 1). However, *Sly*, as the decision below, was an appeal from a grant of summary judgment, and therefore the question presented—whether there was evidence that interpretation of the plan was arbitrary and capricious—was precisely the same. Contrary to the Ninth Circuit attempted rationalization, the Seventh Circuit did not just "accept" the district court's determinations; it agreed with them (712 F.2d 1211-1213).

this case.[7] The record is clear that the new owners of Granny Goose adopted a severance plan, utilizing the employees' original dates of employment with Granny Goose, and that the new owners *have paid substantial benefits under that plan.* Under these circumstances, the words of the Seventh Circuit are apt:

> "To award severance benefits under these facts would result in a windfall to employees who retained their positions with the purchaser of the going concern, which was clearly not the intention or goal of either the [severance plan] or of ERISA" (*Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, 1211; and see *Jung v. FMC Corp.* (9 Cir, 1985) 755 F.2d 708, 714 ("[P]olicy considerations behind ERISA suggest that double recovery should not be favored").

By permitting these plaintiffs to sue for "severance" damages not required by the plan here in issue, the Ninth Circuit has opened a Pandora's box of needless employee "remedies" under ERISA. Equally important, the Ninth Circuit has provided a strong incentive to employers to discontinue voluntary, unfunded programs such as the severance plan here at issue or else face the risk of having to pay, because of irrelevant procedural violations, benefits to employees not otherwise entitled to them.[8]

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[7] In a brief below, plaintiffs did assert that they had declined offers of other employment and stayed in Granny Goose's employ, but there was no evidence of such offers or that plaintiffs were in any way injured by staying in their employment.

Nor could any suggestion be made that asserted procedural violations themselves caused "injury" in the form of denial of benefits. The denial of benefits results from interpretation of the plan, not from any claimed procedural violations.

[8] It is well settled that an employer faces no liability for complete elimination of voluntary, unfunded and nonvested ERISA plans (e.g., *Sutton v. Wierton Steel Div. of Nat. Steel Corp.* (4 Cir. 1983) 724 F.2d 406, 410-411).

II

BY REJECTING AS "ARBITRARY AND CAPRICIOUS" ANY INTERPRETATION OF AN ERISA PLAN WHICH IS NOT REQUIRED BY THE LANGUAGE OF THE PLAN, THE NINTH CIRCUIT HAS SUBSTITUTED ITS JUDGMENT FOR THAT OF THE PLAN ADMINISTRATOR AND HAS PLACED ITSELF IN CONFLICT WITH OTHER COURTS OF APPEALS WHICH HAVE PASSED UPON THE APPLICABLE STANDARD OF REVIEW

The Ninth Circuit did not stop with creation of a new cause of action under ERISA; it also redefined the "arbitrary and capricious" test itself. According to the court, a plan administrator acts arbitrarily and capriciously if it applies an interpretation "not *required* by the severance policy" (Appx. C, p. A29) (emphasis added). This novel holding removes from a plan administrator any discretion to *interpret* the plan and, in effect, substitutes a court's judgment for that of the administrator as to what a plan "requires." Such a restricted test has been rejected by other Courts of Appeals. Thus, in a recent ERISA severance benefits case, the Eleventh Circuit noted that the issue under the arbitrary and capricious test was solely whether the " 'interpretation was made rationally and in good faith—not whether it was right' " (*Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1518, 1522).[9]

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[9] This is in accord with the test applied generally to the decisions of administrators of employee benefit plans: where more than one reasonable interpretation is possible, a court may not substitute its judgment for that of the trustee or administrator (e.g., *Miniard v. Lewis* (D.C.Cir. 1967) 387 F.2d 864, 865). Prior to the decision below, the Ninth Circuit appeared to agree with other federal courts on the standard of review (see *Smith v. CMTA-IAM Pension Trust* (9 Cir. 1981) 654 F.2d 650, 655). And, in a decision rendered exactly one week after the decision below, another panel of the Ninth Circuit appeared to adhere to the previously recognized test (*Jung v. FMC Corp.* (9 Cir. 1985) 755 F.2d 708). Despite this apparent intra-circuit conflict, en banc rehearing was denied.

The decision to deny severance benefits in the instant case was rational and based upon a reasonable interpretation of the plan. The plan's purpose is to provide allowances for employees *"whose positions are eliminated* as a result of * * * elimination of *operations* to which they have been assigned" (ER 238). Plainly, when a portion of a business is sold intact as a unit, the *operations* of that business continue and it is entirely reasonable to conclude that the employment *position* continues, albeit with a new employer.[10] Such was the conclusion of the Seventh Circuit in *Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, in which the severance plan—like the one in issue here—was tied to "*position* elimination" (712 F. 2d 1212) (emphasis added). The Seventh Circuit (adopting the opinion of the district court) declared:

> "While it is true that the work force of Mallory was reduced and positions eliminated within Mallory due to the sale * * *, in fact the work force remained intact and the positions remained available to the employees" (712 F.2d 1211).

Thus, under the terms of the plan here in issue, an employer-administrator in the Seventh Circuit may reasonably conclude that no severance benefits should be paid when employment continues with a new employer; an employer-administrator in the Ninth Circuit may not.[11]

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[10] The Ninth Circuit sought to bolster its decision by referring to supposed admissions of "disparate" treatment of executives and salaried employees (Appx. C, p. A33). But, on their face, the statements in question dealt with executives who lost their *employment positions* (see id.). If an executive *or any other employee* lost his or her employment position as the result of a sale, merger, or otherwise, severance benefits would be paid. There is *no* evidence of "disparate" treatment.

[11] The Ninth Circuit's decision was based in part upon its restricted view of the arbitrary and capricious test and in part upon its erroneous statement of the terms of the Del Monte plan. Although its opinion is not entirely clear, the Ninth Circuit characterized the Del Monte plan as being dependent upon "*job* elimination," reasoning that plaintiffs' "jobs" *with Del Monte* were eliminated as a matter of law (Appx. C, pp. A30-

The Ninth Circuit dismissed the uncontradicted evidence of Del Monte's consistent past practice of denying severance benefits in similar cases on the ground that it was "secret" (Appx. C, pp. A31-A32).[12] However, every other case on point correctly—and sensibly—holds that such consistent past practice is relevant because: "Evenhandedness of treatment is evidence of good faith" (*Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1522; accord: *Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, 1213; *Paris v. Profit Sharing Plan* (5 Cir. 1981) 637 F.2d 357, 362). The supposed "secret" nature of the past practice is plainly irrelevant to the question of employer good faith— which question focuses on the evenhandedness of the employer's action, not employee knowledge of it.[13]

A31). The Ninth Circuit's interpretation is simply wrong; the plan refers to elimination of *employment positions* generally, not "jobs" with Del Monte. For the same reason, the Ninth Circuit attempted distinction of the Seventh Circuit's opinion in *Sly*—on the ground that the *Sly* plan was based upon "unemployment" (see Appx. C, pp. A29-A30, fn.2)—is also wrong. That plan made no reference to unemployment but rather, as here, to "position elimination" (712 F.2d 1212).

[12] There is no basis to the Ninth Circuit's suggestion that Del Monte's interpretation was the result of "hindsight" (Appx. C, p. A32). The uncontroverted evidence showed consistent application throughout the years (ER 189, 236).

[13] Moreover, the uncontroverted evidence here showed that plaintiffs were aware that subsidiaries were sold as going concerns, and that they knew of no employee—whose employment continued—who had received severance pay benefits in such cases (ER 136, 229, 448, 469, 610-611).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted

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Appendix A

United States District Court
Northern District of California
No. C-82-6911-WHO

Barbara Blau, Ram Blau, Ann Mayo
and Richard Lindgren, Individually
and on Behalf of all Other Former
Employees of Del Monte Snacks,
Inc., Similarly Situated,
Plaintiffs,

vs.

Del Monte Corporation, A New York Corporation;
R. J. Reynolds Industries, Inc., a Delaware Corporation;
Del Monte Snacks, Inc., A California Corporation;
and Does I Through XXX, Inclusive,
Defendants.

Partial Transcript of Proceedings
Before the Honorable William H. Orrick, Judge

The Court: The matter is submitted, and I'm going to rule.

The motion for summary judgment is granted. I have reviewed the file, I've reviewed the declarations, I have given every balance—balance of facts to the favor of the plaintiff but I think it's clear that this is—the plan that the Del Monte Company had was clear on its face that in a situation like this, where the nonsalaried employees retained the same jobs they had with Del Monte, were doing the same things for a company that had a similar plan, that the Del Monte plan didn't apply. That the Del Monte plan was directed to employees who were thrown out on the street.

I did read the Sly against Mallory case, the Seventh Circuit case, which I find is . . . very similar to this case. That was an employee welfare benefit plan under ERISA.

And I don't agree with the contention that the dispute about the meaning of a plan is a factual dispute. It seems to me that it's

clearly a legal issue which can be determined on summary judgment.

Now, the issues of fact that the plaintiff claims are, first, that the plan is not intended to compensate for periods of unemployment, but that it's compensation for past services. And that is a good argument.

I find, however, as I indicated, that I'm persuaded by the case in the Seventh Circuit.

Then the plaintiffs contend that a material issue of fact remains as to the defendants' conduct in granting those severance benefits, and whether or not their conduct entitled . . . the plaintiffs to the benefits which they claim here. And they cite the Petrella case, which we discussed in the course of the argument.

But I'm persuaded by the fact that in reading the declaration of Mr. Westphal, who was the director of employee relations, and who was on the committee that drafted the plan, that—and I quote from it—Del Monte has at no time applied its separation allowance plan to pay benefits to non-union salary employees of a division or subsidiary which Del Monte sold as an ongoing concern, where those employees were offered employment by the purchaser.

And it appears from the record that all the plaintiffs have testified that they knew of no instance prior to December, 1980, where a person had received severance benefits in connection with the sale of his or her business as an ongoing concern.

Again, there's no issue of fact, because the plaintiffs didn't, and . . . no doubt because they couldn't—because they have excellent counsel—offer any evidence that the defendants' conduct created an entitlement in them.

The third issue of fact is whether Del Monte has inconsistently applied its severance policy. And that raises . . . . raised the question of the severance of Mr. Zones, who was—it was pointed out did . . . receive something from Del Monte after the date of this case, and it was in connection with the sale of another subsidiary, the Perkie Pies.

Finally, the plaintiffs suggest that the fact that Del Monte promised to reimburse the new owner for any "cestina," as they call it, or severance pay that the new owner might be compelled by Puerto Rican law to pay within two years of the purchase, shows an inconsistency in applying the plan.

No such payments were ever made. That agreement was made four years before the scope of ERISA's preemption made it clear—cleared up in the Supreme Court case of Alessi against Raybestos.

I agree that the standard of review here is arbitrary and capricious. I agree with the reasoning of the Seventh Circuit.

And . . . on the merits I find that from the evidence that's here, uncontroverted, that the substantive question as to whether or not the defendants' decision to deny the plaintiffs severance pay was not arbitrary or capricious, but was fully within the scope of the plan. And I would point out that Granny Goose still has the severance plan which we discussed during the argument.

So you prepare the order, Mr. Rotman.

Mr. Rotman: Thank you very much, Your Honor.

Mr. Vlahos: Your Honor, there are two housekeeping items.

There is also a motion pending, which has now been rendered somewhat moot, for the extension of the discovery period. I take it that is taken off calendar—

The Court: Yes. The case is dismissed.

And I know some very interested people over at Seventh and Mission. And you can . . . . They're wiser than I am, Mr. Vlahos.

Mr. Vlahos: You put me in an impossible situation. How do I respond to that, Your Honor.

(Laughter.)

The Court: All right.

Mr. Rotman: Thank you, Your Honor.

(Whereupon these proceedings were concluded.)

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 83-2622
DC CV 82-6911 WHO
Barbara Blau, Ram Blau, Ann Mayo,
and Richard Lindgren, individually
and on behalf of all other former employees
of Del Monte Snacks, Inc.,
similarly situated,
Plaintiffs-Appellants,
v.
Del Monte Corporation, etc.,
R. J. Reynolds Industries, Inc., etc.,
Del Monte Snacks, Inc., etc.,
Defendants-Appellees.

OPINION
[Filed Dec. 24, 1983]
Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding
Argued and Submitted October 3, 1984

Before: Duniway, Ferguson and Nelson, Circuit Judges

Ferguson, Circuit Judge:

Plaintiffs, nonunion salaried employees of Granny Goose Foods, Inc. ("Granny Goose"), appeal the district court's grant of summary judgment in favor of Del Monte Corporation and others ("Del Monte"), in an action seeking benefits under an employee welfare plan when the employer's business is sold as an ongoing concern, where the employer has pervasively violated the mandates of the Employee Retirement Income Security Act of 1974 ("ERISA"). We conclude that the district court erred in holding that Del Monte's denial of severance benefits to plaintiffs was not arbitrary and capricious, and thus incorrectly granted defendants summary judgment.

I. Factual and Procedural Background

In 1966, Del Monte purchased Granny Goose, which became a wholly owned subsidiary of Del Monte. Employees of Granny Goose were eligible for coverage under various pension and benefit plans of Del Monte, including Del Monte's written—but confidential—"Separation Allowance Policy." This policy was in effect at the time Granny Goose was sold as an ongoing business and is the subject of this action. The policy reads as follows:

CONFIDENTIAL (DISTRIBUTION *ONLY* TO CORPORATE OFFICERS AND CORPORATE EMPLOYEE RELATIONS STAFF MANAGERS)

SEPARATION ALLOWANCE POLICY

Objective

This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for employees whose positions are eliminated as a result of reorganization, consolidation, or elimination of operations to which they have been assigned and for whom appropriate alternative employment opportunities are unavailable within the Corporation.

Eligibility

Subject to the limitations outlined herein, separation allowances may be payable to any terminated full-time regular employee. Employees subject to Union-negotiated termination allowance programs are not eligible.

Separation allowances are *not* payable

—to employees who have been discharged for cause.

—to employees who have refused transfer to suitable positions of approximately equal pay offered to them by the Corporation.

Amounts of Separation Allowances

The schedule attached represents an acceptable standard which has been usefully applied in the past. In the case of previous, simultaneous multiple terminations, it has customarily been offered on a uniform basis to all affected employees regardless of benefits available to them from other Corporation plans such as the Retirement and Savings-Investment Plans. However, all circumstances pertaining to each case, including any retirement and Social Security benefits available should be taken into account in determining the amount of separation allownace, if any.

Depending upon management's judgment of the merits of each case and the individual circumstances of the employee involved, the suggested amounts may be decreased, or increased up to 25%, on the recommendation of the appropriate organization head with executive approval as indicated in the succeeding paragaraph.

Authorities for Approval

On recommendation of the appropriate organization head with the concurrence of the corporate Employee Relations Department, individual separation allowances up to 125% of the schedule may be approved by the Chairman of the Board, President, Executive Vice President, or the Group Vice President to whom the organization unit affected reports.

Allowances in excess of 125% of the schedule may be approved upon recommendation of the appropriate Group Vice President with the concurrence of the Chairman of the Board or President, and the Vice President, Employee Relations.

Payment

At the option of the Corporation, separation allowances may be paid in a single sum or in installments.

Extended Health Benefits

Employees terminated under this program may continue their coverage under the lay-off provisions of the Group Health Plan for regular employees. (Regular rate schedule for 3 months plus employee pay-all rate schedule for up to 8 additional months.) Thereafter, they may convert to individual coverage as offered by The Equitable.

Employees who are eligible for retirement and are considered retired by the Corporation may convert to a retired status under the Retired Group Health Plan at any time following termination but before the conclusion of the 11-month period above.

(Schedule not reprinted.)

Plaintiffs, a class of former nonunion salaried employees of Granny Goose, did not obtain a copy of this written separation policy until after this action was filed. Del Monte neither published the policy nor informed plaintiffs of its existence, contents or terms. Only corporate officers and corporate employee relations staff managers had access to the document.

In 1975, several years before the Separation Allowance Policy was revised to its present form, Del Monte decided either to close or sell Granny Goose. In June 1980, Del Monte announced it was actively seeking to sell Granny Goose as an ongoing concern. A group of private investors purchased the business effective December 13, 1980.

With the exception of four employees who were transferred to the Del Monte payroll, all salaried, nonunion employees of Granny Goose as of December 12, 1980 commenced working for Granny Goose (under its new ownership) on December 13, 1980 with similar responsibilities and similar rates of pay, but somewhat different benefits.

On October 14, 1982, plaintiffs demanded their rights to severance benefits from Del Monte. Del Monte never responded, and on November 18, 1982, plaintiffs filed this action in state court. Their complaint consisted of seven causes of action, one of

which arose under a federal theory of liability, ERISA. 29 U.S.C. § 1132(e)(1).

Defendants removed the action to federal district court pursuant to 28 U.S.C. § 1441 and answsered the complaint. Thereafter, defendants moved for partial summary judgment on plaintiffs' first, second, third, fourth, fifth and seventh causes of action, alleging that ERISA preempted these state law claims. The district court dismissed those causes of action.

Plaintiffs then filed a demand for jury trial on March 1, 1983. The district court granted defendants' motion to strike the demand as untimely on May 18, 1983, and granted defendants' motion for summary judgment on December 1, 1983. This appeal followed.

II. This Action Arises Under ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive remedial statute designed to protect working men and women and to cure widespread weaknesses in the private pension system. To strengthen the pension system, ERISA established minimum vesting, funding, fiduciary and disclosure requirements which every pension plan must meet. It also delineated a specific uniform standard of conduct for fiduciaries. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639.

ERISA applies to any "employee benefit plan" if it is established or maintained by any employer or employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. § 1003(a). An "employee welfare benefit plan" is broadly defined to include:

> [A]ny plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . unemployment, or vacation benefits, . . . or (B) any benefit described in section 186(c) of this title (other than pensions

on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). Section 186(c), cited in subsection (B) above, specifically lists "severance benefits." The effect of citing to section 186(c) is "to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar. . . ." 29 C.F.R. § 2510.3-1(a)(3). *See Donovan v. Dillingham,* 688 F.2d 1367, 1370-73 (11th Cir. 1982) (en banc). Thus, the severance pay plan in this case is an employee welfare benefit plan to which ERISA applies.

Neither the vesting and participation requirements nor the funding requirements of ERISA apply to employee welfare benefit plans such as severance plans, 29 U.S.C. §§ 1051(1), 1081(a)(1), but the reporting and disclosure requirements, 29 U.S.C. §§ 1021-1031, and the fiduciary responsibility standards, 29 U.S.C. §§ 1101-1114, do. Thus, Del Monte's severance pay plan is subject to ERISA's reporting, disclosure, and fiduciary requirements. Once established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and reporting requirements detailed under ERISA. *Donovan v. Dillingham,* 688 F.2d 1367, 1372 (11th Cir. 1982). *Accord, Dependahl v. Falstaff Brewing Corp.,* 491 F. Supp. 1188, 1195 (E.D. Mo. 1980), *aff'd* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981).

III. The Decision to Deny Benefits

A. Standard of Review

"Summary judgment is appropriate if, viewing the evidence in the light most favorable to the opposing party, the trial court finds 'that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c)." *Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983). The court of appeals reviews de novo a district court's grant of summary judgment. *Id.*

In this case, this court, like the trial court, reviews another decisionmaker: the welfare benefit plan administrator. Del Monte, although it assumed the posture of an administrator in accordance with 29 U.S.C. § 1002(16)(A)(ii), made no attempt to comply with any of the duties that ERISA places upon a benefit plan administrator. To the contrary, the Severance Allowance Policy was actively concealed in violation of ERISA's reporting and disclosure requirements. *See* 29 U.S.C. § 1021(a) (disclosure to all plan participants); 29 U.S.C. § 1021(b) (various reporting requirements). Nor has Del Monte created any of the procedural mechanisms for benefit determinations that ERISA mandates. *E.g.*, 29 U.S.C § 1133 (requiring compliance with claims procedures under Department of Labor regulations).

Despite its failure to assume any of ERISA's obligations, Del Monte urges upon us the deferential standard of review generally applicable to administrator's decisions under ERISA: "decisions by the trustees of an employee benefit plan will not be reversed by the courts unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 753 F.2d 1133, 1135 (9th Cir. 1984). While not deciding that this is the only applicable standard of review when ERISA's provisions have been flouted in such a wholesale and flagrant manner, we do decide that the trustee's decision in this case fails when judged by even this deferential standard.

B. The Decision to Deny Severance Benefits to the Employees Fails under any Applicable Standard of Review

The administrator of an employee welfare benefit plan, such as this severance benefit policy, has no discretion to secrete the plan, to flout the reporting, disclosure and fiduciary obligations imposed by ERISA, or to deny benefits in contravention of the plan's plain terms. 29 U.S.C. §§ 1101-1114 (fiduciary responsibilities with respect to plan); 29 U.S.C. §§ 1021-1031 (reporting and disclosure provisions); 29 U.S.C. § 1104(a)(1)(D) (plan must be administered "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are

consistent with the provisions of [ERISA]"). Del Monte's decision to deny benefits in this case was part and parcel of its flagrant violation of ERISA's reporting, disclosure and fiduciary standards. Its denial also contradicted the provision of benefits for which the plan's plain terms—stripped of any secret analysis of the plan's secreted terms—provide. Thus, the defendants' decision was, at best, arbitrary and capricious.

The undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA. The Separation Allowance Policy was "confidential," i.e., secret, in contravention of ERISA's reporting and disclosure provisions. 29 U.S.C. §§ 1021-1031. The policy was subject to no claims procedure. ERISA mandates a reasonable claims procedure, 29 U.S.C. § 1133; the Code of Federal Regulations establishes exactly what will be considered reasonable:

> (1) A claims procedure will be deemed to be *reasonable only* if it:
>
> (i) Complies with the provisions of . . . this section . . . .
>
> (ii) Is described in the summary plan description . . . ,
>
> (iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation and processing of plan claims, and
>
> (iv) Provides for informing participants in writing, in a timely fashion, of the time limits . . . .

29 C.F.R. § 2560.503-1(b)(1) (emphasis supplied). Here, there was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything. Del Monte's claims procedure fails simply because there was none. *Id.* Similarly, Del Monte's administration was arbitrary and capricious because it failed to conform to ERISA's reporting and disclosure requirements.

While it is thus clear that violations of ERISA's procedural requirements—reporting, disclosure and claims procedures—amount to arbitrary and capricious conduct, the remedy to which this entitles the victimized employees has often been less

than satisfactory. Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy. *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 393 (7th Cir. 1983). We do not deny the logic of this proposition in the ordinary case. ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans.

Under ERISA, however, no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights between covered employees and their employer. The importance of disclosure applies to welfare benefit plans as well as to pensions:

> Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was . . . being administered as intended. It was expected that the information disclosed would enable employees *to police* their plans.

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649 (emphasis supplied).

When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quality of defendants' procedural violations thus work a substantive harm. We therefore consider the continuing arbitrary and capricious procedural violations in determining whether the decision to deny benefits in a particular case was also arbitrary and capricious. We hold that the continued arbitrary and capricious administration practiced by Del Monte is highly probative of whether a particular decision to deny benefits was infected by its having been made in conformity with the objectionable scheme. *Cf. Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (listing various other factors that may be taken into consideration in determining whether the decision of a pension plan administrator

met the arbitrary and capricious standard). In this case, of course, this factor weighs heavily against Del Monte.[1]

Other factors also weigh against Del Monte's denial of benefits in this case. With employee welfare benefit plans, as with pension plans that are subject to the full panoply of ERISA requirements, imposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision. *See Morgan v. Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981) ("Where the Trustees impose a standard not required by the pension plan itself, this court has stated that such action 'would result in an unwarranted and arbitrary construction of the Plan.' ") (quoting *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1975)).

Del Monte imposed several standards not required by the severance policy. The plan provides for severance pay when jobs are "*eliminated*" and "alternative *employment opportunities are unavailable within the Corporation*"[2] (emphasis supplied). The

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[1] The court in *Sly v. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983), upon which defendants place heavy reliance, had no occasion to determine whether that plan was infected with arbitrary and capricious administration. Although the *Sly* plan, like Del Monte's plan, was kept confidential from the participants, the appellate court accepted the district court's determination that "the employee benefit plan was administered in a rational and reasonable manner, in good faith, within the discretion of the administrators and in accordance with the plain wording of the documents and instruments governing the plan." *Id.* at 1211. Del Monte's plan, in contrast, was administered in an inherently unreasonable manner.

[2] In *Sly*, the plan, "read as a whole," conditioned the availability of severance benefits upon the employee's subsequent and continued unemployment. *Sly*, 712 F.2d at 1211. Del Monte's plan says nothing of unemployment. In fact, the policy in this case exempts only three classes of people, of which plaintiffs comprise no part: employees subject to union-negotiated termination allowance programs; employees who have been discharged for cause; and employees who have refused transfer to suitable positions of approximately equal pay offered to them by "the Corporation." The employer's denial of benefits in *Sly*, which was

plan does not condition receipt of severance benefits upon elimination of positions from the face of the earth, but from "the Corporation." The plan does not condition receipt of benefits upon employees' subsequent unemployment, but upon job "eliminat[ion]." The plan does not condition receipt of benefits upon failure of a successor corporation to offer employees jobs after their employment with Del Monte ceases, but upon job "eliminat[ion]."

The plan specifies only that the job be "eliminated" from the Corporation. No permissible construction of "eliminated" permits us to imply other conditions into the plan, as Del Monte would have us do. Neither the case law nor Del Monte's past practice allows such bootstrapping.

Certainly, under the applicable case law we cannot deny that jobs are eliminated—and then, perhaps, reinstated—when one employer succeeds another. Even under a collective bargaining agreement, where the National Labor Relations Act imposes various duties on a successor employer, "a business entity which replaces another is not obligated to hire all or any of its predecessor's employees." *Bates v. Pacific Maritime Association,* 744 F.2d 705, 708 (9th Cir. 1984) (citations omitted) (applying this rule to a successorship issue arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C, §§ 2000e—2000e-17 and 42 U.S.C. § 1981).[3] Lack of obligation to rehire, and the consequence of the

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neither arbitrary nor capricious, thus differs from Del Monte's because the two plans differ.

The plan in this case also differs from the plan in *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), where the decision to deny severance pay was not arbitrary and capricious. The *Pinto* plan, like the *Sly* plan, but unlike Del Monte's plan, conditioned receipt of severance benefits upon the former.

[3] Del Monte contends that the employees' impressions of their work show only slight differences between their job tasks before and after the sale. While perhaps supported by deposition testimony, this contention is irrelevant. The employees' subjective attitude about job similarity does not bear on whether one job was eliminated and another took its place,

prior job's elimination, is no less real where, as here, the employees lack the benefits of a collective bargaining agreement with either the predecessor or successor employer.

Neither does the term "eliminated" necessarily contain any of these conditions inherent in its usage. *See, e.g., Livernois v. Warner-Lambert,* 723 F.2d 1148, 1155 (4th Cir. 1983) (ending defendant's "liability for job severance to those continuing as employees (with the successor) . . . would clearly constitute . . . job termination"); *Sly,* 712 F.2d at 1210 (even though claimants did not receive severance benefits in this case, the court acknowledged that "(a)s a result of the sale [of the business as an ongoing concern], employees of the [predecessor company] were terminated from their employment"); *Pinto,* 480 F. Supp. at 364 (claimants unentitled to benefits because of overall construction of severance plan, but court acknowledged that sale of business as an ongoing concern resulted in the loss of plaintiff's old job, and his being "immediately hired by defendants' successor company"). *See also Chapin v. Fairchild Camera & Instrument Corp.,* 31 Cal. App. 3d 192, 197-98, 107 Cal. Rptr. 111, 115 (1973) ("the sale [of a business as an ongoing concern] involved a permanent release of the Employees").

Nor can we permit resort to Del Monte's secret intentions behind its secret severance pay policy to imply these conditions into the plan. Del Monte claims that the secret purpose behind its secret severance benefit policy was to benefit only those employees who were without a job of any kind after termination. We decline to refer to the secret intent behind a secret plan to determine whether the denial of severance benefits in this case was arbitrary and capricious. To permit reference to such subterfuge would only encourage violation of ERISA's reporting and disclosure requirements, in the hope of later being able to interpret the policy through the cost-benefit analysis of hindsight. In *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982), the court stated: "it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or

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because the plan conditions receipt of benefits on job elimination—not job dissimilarity.

assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards." *Id.* at 1372. Thus, that court decided that a plan did exist within the meaning of ERISA despite its informal and unwritten form. That court decided only that jurisdiction under ERISA therefore existed. We are faced with the next logical question: May the same failure to satisfy reporting or fiduciary standards circumvent the company's obligations under the written expression of the plan? We decline to reward such subterfuge by permitting reference to Del Monte's hidden intentions behind its hidden plan.

For similar reasons we decline to reward Del Monte's past practice of denying severance benefits to employees in this situation by interpreting the plan with reference to Del Monte's past course of conduct. Imposition of conditions outside the plan amounts to arbitrary and capricious conduct in spite of how often it is practiced. *See Dennard v. Richards Group, Inc.*, 681 F.2d at 318 (" 'if the interpretation is unreasonable from the beginning, such an interpretation may still be arbitrary and capricious' ") (quoting *Morgan v. Mullins*, 643 F.2d at 1324 n.4).

ERISA seeks "to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan." *Donovan v. Dillingham*, 688 F.2d at 1372. Not coincidentally, the evils against which ERISA was enacted to guard—insecurity, lack of knowledge, and inability to police plan administration—are just the evils that appear in Del Monte's administration of its plan. Del Monte's counsel revealed as much in his treatment of two hypothetical situations that could arise under its plan. First, in Defendant's Reply Memorandum in Support of Motion for Summary Judgment before the district court, Del Monte states: "Even if [a president of a divested subsidiary of Del Monte which had been sold as an ongoing concern] actually received such severance benefits, it is understandable that the president of the company would lose his job when his company was bought as an on-going [sic] concern and that he would receive severance pay." Understandable for a president, but not for a salaried nonunion

employee, based on Del Monte's secret distinctions and conditions. Second, at oral argument, Del Monte's counsel was asked, "What if an executive, the president of Del Monte, terminated his employment with Del Monte and the next day got a job working for Pillsbury. Would he be entitled to severance pay?" Counsel responded, "Probably." Thus, benefits would "probably" be available for a president or a vice president, but not for a salaried nonunion employee, based on Del Monte's secret distinctions and conditions. We decline to undermine the purposes of ERISA by considering Del Monte's secret conditions on its secret plan that result in such widely disparate results.

The result in this case would be similar if we had decided it under the remaining prongs of the test for evaluating the decision of an ERISA administrator: erroneous on a question of law, made in bad faith, or unsupported by substantial evidence. *Malhiot v. Southern California Retail Clerks Union,* 735 F.2d at 1135. A procedural error may be "a significant error on a question of law." *Wolfe v. J.C. Penney Co.,* 710 F.2d 388, 393 (7th Cir. 1983). The plethora of procedural errors in this case thus constitute significant errors on a question of law, and they may be weighed in the evaluation of the administrator's substantive decision to deny benefits—a decision implicated in the procedural morass. Similarly, the gross violations of ERISA's reporting and disclosure duties weigh in the evaluation of whether the administrator made his decisions—including the substantive decision in this case—in bad faith, or in contravention of his fiduciary duties. Finally, substantial evidence would not support this decision because the employer's secret intentions and the employees' subjective attitudes are irrelevant to whether the jobs were eliminated and the decison to deny benefits arbitrary.

IV. Preemption

Plaintiffs' complaint contained seven causes of action, one of which was based on a federal theory of liability (ERISA). The remaining causes of action were based on state common law theories of liability (breach of contract implied in fact; promisory

estoppel; estoppel by conduct; fraud and deceit; and breach of contract).

Defendants moved for partial summary judgment on plaintiffs' state law claims based on ERISA preemption. The district court granted the motion, and the order dismissing the first second, third, fourth, fifth, and seventh causes of action was entered May 18, 1983. Plaintiffs argue common law principles are applicable under ERISA as a matter of federal law, and the court may therefore incorporate state common law causes of action into that common law to further ERISA's policies.

The district court was correct in finding that ERISA preempted plaintiffs' state common law causes of action. We recognize that "the preemptive effect of ERISA is broad, [but] it is not all-encompassing." *Lane v. Goren,* 743 F.2d 1337, 1339 (9th Cir. 1984). ERISA is, however, broad enough to preempt the causes of action upon which plaintiffs sought to rely. *See Lafferty v. Solar Turbines International,* 666 F.2d 408 (9th Cir. 1982) (common law breach of contract cause of action preempted by ERISA); *Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981) (Congress had preempted state common law claims of tortious interference with employee benefit plans).

v. Demand for Jury Trial

The trial judge's decision to strike plaintiffs' demand for jury trial will be reversed upon a showing of abuse of discretion. *Las Vegas Sun, Inc. v. Summa Corp.,* 610 F.2d 614, 621 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980). Since plaintiffs did not request a jury trial before this case was removed from state court, Fed. R. Civ. P. 38(b), made applicable by Rule 81(c), required plaintiffs to demand a jury trial within ten days from the filing of the last pleading concerned with the issues for which trial by jury is sought. The last pleading was Del Monte's answer, filed December 23, 1982. Plaintiffs filed a demand for a jury trial on March 1, 1983, almost two months late. Failure to file within the time provided constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

Plaintiffs argue the district court abused its discretion in failing to grant relief from their unintentional waiver. The district court in its discretion may order a jury trial on a motion by a party who has not filed a timely demand for one. Fed. R. Civ. P. 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence. *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983). *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 675 (9th Cir. 1975) (the district court's discretion "should rarely be exercised to grant a trial by jury in default of a proper request for it"). Plaintiffs allege no reason for their failure to file a timely demand for jury trial. Nor is there an independent constitutional or statutory right to jury trial in ERISA actions. *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States*, 627 F.2d 820, 828-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Thus, the district court did not abuse its discretion in striking plaintiffs' untimely demand for jury trial.

CONCLUSION

Due to the serious violations of ERISA by Del Monte, we find that its general administration of the Severance Allowance Policy and its particular decision to deny severance benefits to plaintiffs under its interpretation of that policy were arbitrary and capricious. Under any standard of review, Del Monte's failure to provide severance benefits to these plaintiffs must fail.

The district court erred in finding that Del Monte's decision to deny severance benefits to plaintiffs was not arbitrary and capricious. Its grant of summary judgment is REVERSED and this cause is REMANDED to the district court for further proceedings upon plaintiffs' complaint.

Appendix C

United States Court of Appeals

For the Ninth Circuit

No. 83-2622
DC CV 82-6911 WHO

AMENDED OPINION

Barbara Blau, Ram Blau, Ann Mayo,
and Richard Lindgren, individually
and on behalf of all other former
employees of Del Monte Snacks, Inc.,
similarly situated,
Plaintiffs-Appellants,

vs.

Del Monte Corporation, etc.
R.J. Reynolds Industries, Inc., etc.,
Del Monte Snacks, Inc., etc.,
Dedendants-Appellees.

[Filed March 5, 1985]

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted October 3, 1984
Decided December 5, 1984

Before: Duniway, Ferguson and Nelson, Circuit Judges

FERGUSON, Circuit Judge:

Plaintiffs, nonunion salaried employees of Granny Goose Foods, Inc. ("Granny Goose"), appeal the district court's grant of summary judgment in favor of Del Monte Corporation and others ("Del Monte"), in an action seeking benefits under an employee welfare plan when the employer's business is sold as an ongoing concern, where the employer has pervasively violated the mandates of the Employee Retirement Income Security Act of 1974

("ERISA"). We conclude that the district court erred in holding that Del Monte's denial of severance benefits to plaintiffs was not arbitrary and capricious, and thus incorrectly granted defendants summary judgment. Plaintiffs did not move for summary judgment, so we need not decide whether Del Monte's denial of benefits was arbitrary and capricious as a matter of law.

I. Factual and Procedural Background

In 1966, Del Monte purchased Granny Goose, which became a wholly owned subsidiary of Del Monte. Employees of Granny Goose were eligible for coverage under various pension and benefit plans of Del Monte, including Del Monte's written—but confidential—"Separation Allowance Policy." This policy was in effect at the time Granny Goose was sold as an ongoing business and is the subject of this action. The policy reads as follows:

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SEPARATION ALLOWANCE POLICY

Objective

This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for employees whose positions are eliminated as a result of reorganization, consolidation, or elimination of operations to which they have been assigned and for whom appropriate alternative employment opportunities are unavailable within the Corporation.

Eligibility

Subject to the limitations outlined herein, separation allowances may be payable to any terminated full-time regular employee. Employees subject to Union-negotiated termination allowance programs are not eligible.

Separation allowances are *not* payable—to employees who have been discharged for cause—to employees who have refused transfer to suitable positions of approximately equal pay offered to them by the Corporation.

Amounts of Separation Allowances

The schedule attached represents an acceptable standard which has been usefully applied in the past. In the case of previous, simultaneous multiple terminations, it has customarily been offered on a uniform basis to all affected employees regardless of benefits available to them from other Corporation plans such as the Retirement and Savings-Investment Plans. However, all circumstances pertaining to each case, including any retirement and Social Security benefits available should be taken into account in determining the amount of separation allowance, if any.

Depending upon management's judgment of the merits of each case and the individual circumstances of the employee involved, the suggested amounts may be decreased, or increased up to 25%, on the recommendation of the appropriate organization head with executive approval as indicated in the succeeding paragraph.

Authorities for Approval

On recommendation of the appropriate organization head with the concurrence of the corporate Employee Relations Department, individual separation allowances up to 125% of the schedule may be approved by the Chairman of the Board, President, Executive Vice President, or the Group Vice President to whom the organization unit affected reports.

Allowances in excess of 125% of the schedule may be approved upon recommendation of the appropriate Group Vice President with the concurrence of the Chairman of the Board or President, and the Vice President, Employee Relations.

Payment

At the option of the Corporation, separation allowances may be paid in a single sum or in installments.

Extended Health Benefits

Employees terminated under this program may continue their coverage under the lay-off provisions of the Group Health Plan for regular employees. (Regular rate schedule for 3 months plus employee pay-all rate schedule for up to 8 additional months.) Thereafter, they may convert to individual coverage as offered by The Equitable.

Employees who are eligible for retirement and are considered retired by the Corporation may convert to a retired status under the Retired Group Health Plan at any time following termination but before the conclusion of the 11-month period above.

(Schedule not reprinted.)

Plaintiffs, a class of former nonunion salaried employees of Granny Goose, did not obtain a copy of this written separation policy until after this action was filed. Del Monte neither published the policy nor informed plaintiffs of its existence, contents or terms. Only corporate officers and corporate employee relations staff managers had access to the document.

In 1975, several years before the Separation Allowance Policy was revised to its present form, Del Monte decided either to close or sell Granny Goose. In June 1980, Del Monte announced it was actively seeking to sell Granny Goose as an ongoing concern. A group of private investors purchased the business effective December 13, 1980.

With the exception of four employees who were transferred to the Del Monte payroll, all salaried, nonunion employees of Granny Goose as of December 12, 1980 commenced working for Granny Goose (under its new ownership) on December 13, 1980 with similar responsibilities and similar rates of pay, but somewhat different benefits.

On October 14, 1982, plaintiffs demanded their rights to severance benefits from Del Monte. Del Monte never responded, and on November 18, 1982, plaintiffs filed this action in state court. Their complaint consisted of seven causes of action, one of which arose under a federal theory of liability, ERISA. 29 U.S.C. § 1132(e)(1).

Defendants removed the action to federal district court pursuant to 28 U.S.C. § 1441 and answered the complaint. Thereafter, defendants moved for partial summary judgment on plaintiffs' first, second, third, fourth, fifth and seventh causes of action, alleging that ERISA preempted these state law claims. The district court dismissed those causes of action.

Plaintiffs then filed a demand for jury trial on March 1, 1983. The district court granted defendants' motion to strike the demand as untimely on May 18, 1983, and granted defendants' motion for summary judgment on December 1, 1983. This appeal followed.

II. This Action Arises Under ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive remedial statute designed to protect working men and women and to cure widespread weaknesses in the private pension system. To strenghen the pension system, ERISA established minimum vesting, funding, fiduciary and disclosure requirements which every pension plan must meet. It also delineated a specific uniform standard of conduct for fiduciaries. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639.

ERISA applies to any "employee benefit plan" if it is established or maintained by any employer or employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. §1003 (a). An "employee welfare plan" is broadly defined to include:

> [A]ny plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the

> purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . unemployment, or vacation benefits, . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C.§ 1002(1). Section 186(c), cited in subsection (B) above, specifically lists "severance benefits." The effect of citing to section 186(c) is "to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar . . . ." 29 C.F.R. § 2510.3-1(a)(3). *See Donovan v. Dillingham*, 688 F.2d 1367, 1370-73 (11th Cir. 1982) (en banc). Thus, the severance pay plan in this case is an employee welfare benefit plan to which ERISA applies.

Neither the vesting and participation requirements nor the funding requirements of ERISA apply to employee welfare benefit plans such as severance plans, 29 U.S.C. §§ 1051(1), 1081(a)(1), but the reporting and disclosure requirements, 29 U.S.C. §§ 1021-1031, and the fiduciary responsibility standards, 29 U.S.C. §§ 1101-1114, do. Thus, Del Monte's severance pay plan is subject to ERISA's reporting, disclosure, and fiduciary requirements. Once established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and reporting requirements detailed under ERISA. *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). *Accord, Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188, 1195 (E.D. Mo. 1980), *aff'd* 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).

III. The Decision to Deny Benefits

A. Standard of Review

"Summary judgment is appropriate if, viewing the evidence in the light most favorable to the opposing party, the trial court finds 'that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P.

56(c)." *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). The court of appeals reviews de novo a district court's grant of summary judgment. *Id.*

In this case, this court, like the trial court, reviews another decisionmaker: the welfare benefit plan administrator. Del Monte, although it assumed the posture of an administrator in accordance with 29 U.S.C. § 1002(16) (A) (ii), made no attempt to comply with any of the duties that ERISA places upon a benefit plan administrator. To the contrary, the Severance Allowance Policy was actively concealed in violation of ERISA's reporting and disclosure requirements. *See* 29 U.S.C. § 1021(a) (disclosure to all plan participants); 29 U.S.C. § 1021(b) (various reporting requirements). Nor has Del Monte created any of the procedural mechanisms for benefit determinations that ERISA mandates. *E.g.*, 29 U.S.C. § 1133 (requiring compliance with claims procedures under Department of Labor regulations).

Despite its failure to assume any of ERISA's obligations, Del Monte urges upon us the deferential standard of review generally applicable to administrator's decisions under ERISA: "decisions by the trustees of an employee benefit plan will not be reversed by the courts unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984). We do not decide that this is the only applicable standard of review when ERISA's provisions have been flouted in such a wholesale and flagrant manner. We do, however, decide that the district court erred by holding, as a matter of law, that Del Monte's decision survived even this deferential standard.

B. The Decision to Deny Severance Benefits to the Employees Could Not be Said as a Matter of Law Not to be Arbitrary and Capricious

The administrator of an employee welfare benefit plan, such as this severance benefit policy, has no discretion to secrete the plan, to flout the reporting, disclosure and fiduciary obligations imposed by ERISA, or to deny benefits in contravention of the plan's plain

terms. 29 U.S.C. §§ 1101-1114 (fiduciary responsibilities with respect to plan); 29 U.S.C. §§ 1021-1031 (reporting and disclosure provisions); 29 U.S.C. § 1104(a)(1)(D) (plan must be administered "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]"). It is undisputed that the administration of this plan failed to comply with these reporting, disclosure and fiduciary requirements. Del Monte's decision to deny benefits in this case was made in the course of, and could have been infected by, these ERISA violations. Thus, the defendants' decision could not be said, as a matter of law, not to be arbitrary and capricious, and summary judgment was inappropriately granted to Del Monte at this stage of the proceedings.

The undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA. The Separation Allowance Policy was "confidential," i.e., secret, in contravention of ERISA's reporting and disclosure provisions. 29 U.S.C. §§ 1021-1031. The policy was subject to no claims procedure. ERISA mandates a reasonable claims procedure, 29 U.S.C. § 1133; the Code of Federal Regulations establishes exactly what will be considered reasonable:

> (1) A claims procedure will be deemed to be *reasonable only* if it:
>
> (i) Complies with the provisions of . . . this section . . . .
>
> (ii) Is described in the summary plan description . . . ,
>
> (iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation and processing of plan claims, and
>
> (iv) Provides for informing participants in writing, in a timely fashion, of the time limits . . . .

29 C.F.R. § 2560.503-1(b)(1) (emphasis supplied). Here, there was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything. Del Monte's claims procedure fails simply because there was none. *Id.*

Whiie it is thus clear that violations of ERISA's procedural requirements—reporting, disclosure and claims procedures—may amount to arbitrary and capricious conduct, the remedy to which this entitles the victimized employees has often been less than satisfactory. Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy. *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 393 (7th Cir. 1983). We do not deny the logic of this proposition in the ordinary case. ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans.

Under ERISA, however, no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights between covered employees and their employer. The importance of disclosure applies to welfare benefit plans as well as to pensions:

> Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was . . . being administered as intended. It was expected that the information disclosed would enable employees *to police* their plans.

H.R Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649 (emphasis supplied).

When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quantity of defendants' procedural violations may then work a substantive harm. Thus, in reviewing an administrator's decision, a court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary and capricious. We hold that the type of plan administration practiced by Del Monte is highly probative of whether a particular decision

to deny benefits was infected by its having been made in comformity with the objectionable scheme. *Cf. Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (listing various other factors that may be taken into consideration in determining whether the decision of a pension plan administrator met the arbitrary and capricious standard). In this case, of course, this factor weighs heavily against Del Monte.[1]

Other factors also weigh against Del Monte's denial of benefits in this case. With employee welfare benefit plans, as with pension plans that are subject to the full panoply of ERISA requirements, imposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision. *See Morgan v. Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981) ("Where the Trustees impose a standard not required by the pension plan itself, this court has stated that such action 'would result in an unwarranted and arbitrary construction of the Plan' ") (quoting *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1975)).

Del Monte imposed several standards not required by the severance policy. The plan provides for severance pay when jobs are "*eliminated*" and "alternative *employment opportunities are unavailable within the Corporation*"[2] (emphasis supplied). The

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[1] The court in *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983), upon which defendants place heavy reliance, had no occasion to determine whether that plan was infected with arbitrary and capricious administration. Although the *Sly* plan, like Del Monte's plan, was kept confidential from the participants, the appellate court accepted the district court's determination that "the employee benefit plan was administered in a rational and reasonable manner, in good faith, within the discretion of the administrators and in accordance with the plain wording of the documents and instruments governing the plan." *Id.* at 1211. Del Monte's administration, in contrast, was characterized by so many ERISA violations that it is impossible to hold, as a matter of law, that the administration was not arbitrary and capricous.

[2] In *Sly*, the plan, "read as a whole," conditioned the availability of severance benefits upon the employee's subsequent and continued unemployment. *Sly*, 712 F.2d at 1211. Del Monte's plan says nothing of unemployment. In fact, the policy in this case exempts only three classes

plan does not condition receipt of severance benefits upon elimination of positions from the face of the earth, but upon job "eliminat[ion]" and unavailability of "appropriate alternative employment opportunities . . . within *the Corporation*." (Emphasis supplied). The plan does not condition receipt of benefits upon employees' subsequent unemployment, but upon job "eliminat[ion]." The plan does not condition receipt of benefits upon failure of a successor corporation to offer employees jobs after their employment with Del Monte ceases, but upon job "eliminat[ion]."

The plan specifies only that the job be "eliminated" and that alternative Corporation jobs be unavailable. No permissible construction of "eliminated" permits us to imply other conditions into the plan, as Del Monte would have us do. Neither the case law nor Del Monte's past practice allows such bootstrapping.

Certainly, under the applicable case law we cannot deny that jobs are eliminated—and then, perhaps, reinstated—when one employer succeeds another. Even under a collective bargaining agreement, where the National Labor Relations Act imposes various duties on a successor employer, "a business entity which replaces another is not obligated to hire all or any of its predecessor's employees." *Bates v. Pacific Maritime Association*, 744 F.2d 705, 708 (9th Cir. 1984) (citations omitted) (applying this rule to a successorship issue arising under Title VII of the Civil Rights

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of people, of which plaintiffs comprise no part: employees subject to union-negotiated termination allowance programs; employees who have been discharged for cause; and employees who have refused transfer to suitable positions of approximately equal pay offered to them by "the Corporation." The employer's denial of benefits in *Sly*, which was neither arbitrary nor capricious, thus differs from Del Monte's because the two plans differ.

The plan in this case also differs from the plan in *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), where the decision to deny severence pay was not arbitrary and capricious. The *Pinto* plan, like the *Sly* plan, but unlike Del Monte's plan, conditioned receipt of severance benefits upon the former employee's unemployment. *Id.* at 364.

Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 and 42 U.S.C. § 1981).[3] Lack of obligation to rehire, and the consequence of the prior job's elimination, is no less real where, as here, the employees lack the benefits of a collective bargaining agreement with either the predecessor or successor employer.

Neither does the term "eliminated" necessarily contain any of these conditions inherent in its usage. *See, e.g., Livernois v. Warner-Lambert,* 723 F.2d 1148, 1155 (4th Cir. 1983) (ending defendant's "liability for job severance to those continuing as employees [with the successor] . . . would clearly constitute . . . job termination"); *Sly*, 712 F.2d at 1210 (even though claimants did not receive severance benefits in this case, the court acknowledged that "[a]s a result of the sale [of the business as an ongoing concern], employees of the [predecessor company] were terminated from their employment"); *Pinto*, 480 F.Supp. at 364 (claimants unentitled to benefits because of overall construction of severance plan, but court acknowledged that sale of business as an ongoing concern resulted in the loss of plaintiff's old job, and his being "immediately hired by defendants' successor company"). *See also Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 197-98, 107 Cal. Rptr. 111, 115 (1973) ("the sale [of a business as an ongoing concern] involved a permanent release of the Employees").

Nor can we permit resort to Del Monte's secret intentions behind its secret severance pay policy to imply these conditions into the plan. Del Monte claims that the secret purpose behind its secret severance benefit policy was to benefit only those employees who were without a job of any kind after termination. We decline to refer to the secret intent behind a secret plan to

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[3] Del Monte contends that the employees' impressions of their work show only slight differences between their job tasks before and after the sale. While perhaps supported by deposition testimony, this contention is irrelevant. The employees' subjective attitude about job similarity does not bear on whether one job was eliminated and another took its place, because the plan conditions receipt of benefits on job elimination—not job dissimilarity.

determine whether the denial of severance benefits in this case was not arbitrary and capricious. Allowing reference to this factor would only encourage violation of ERISA's reporting and disclosure requirements, in the hope of later being able to interpret the policy through the cost-benefit analysis of hindsight. In *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), the court stated: "it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards." *Id.* at 1372. Thus, that court decided that a plan did exist within the meaning of ERISA despite its informal and unwritten form. That court decided only that jurisdiction under ERISA therefore existed. We are faced with the next logical question: May the same failure to satisfy reporting or fiduciary standards go judicially unnoticed in determining the company's obligations under the written expression of the plan? Like the *Donovan* court, we answer "no."

For similar reasons we decline to reward Del Monte's past practice of denying severance benefits to employees in this situation by interpreting the plan with reference to Del Monte's past course of conduct. Imposition of conditions outside the plan amounts to arbitrary and capricious conduct in spite of how often it is practiced. *See Dennard v. Richards Group, Inc.*, 681 F.2d at 318 (" 'if the interpretation is unreasonable from the beginning, such an interpretation may still be arbitrary and capricious' ") (quoting *Morgan v. Mullins*, 643 F.2d at 1324 n.4).

ERISA seeks "to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan." *Donovan v. Dillingham*, 688 F.2d at 1372. Not coincidentally, the evils against which ERISA was enacted to guard—insecurity, lack of knowledge, and inability to police plan administration—are just the evils that appear in Del Monte's administration of its plan. Del Monte's counsel revealed as much in his treatment of two hypothetical situations that could arise under its plan. First, in

Defendant's Reply Memorandum in Support of Motion for Summary Judgment before the district court, Del Monte states: "Even if [a president of a divested subsidiary of Del Monte which had been sold as an ongoing concern] actually received such severance benefits, it is understandable that the president of the company would lose his job when his company was bought as an on-going [sic] concern and that he would receive severance pay." Understandable for a president, but not for a salaried nonunion employee, based on Del Monte's secret distinctions and conditions. Second, at oral argument, Del Monte's counsel was asked, "What if an executive, the president of Del Monte, terminated his employment with Del Monte and the next day got a job working for Pillsbury. Would he be entitled to severance pay?" Counsel responded, "Probably." Thus, benefits would "probably" be available for a president or a vice president, but not for a salaried nonunion employee, based on Del Monte's secret distinctions and conditions. We decline to undermine the purposes of ERISA by considering Del Monte's secret conditions on its secret plan that result in such widely disparate results.

IV. Preemption

Plaintiffs' complaint contained seven causes of action, one of which was based on a federal theory of liability (ERISA). The remaining causes of action were based on state common law theories of liability (breach of contract implied in fact; promissory estoppel; estoppel by conduct; fraud and deceit; and breach of contract).

Defendants moved for partial summary judgment on plaintiffs' state law claims based on ERISA preemption. The district court granted the motion, and the order dismissing the first second, third, fourth, fifth, and seventh causes of action was entered May 18, 1983. Plaintiffs argue common law principles are applicable under ERISA as a matter of federal law, and the court may therefore incorporate state common law causes of action into that common law to further ERISA's policies.

The district court was correct in finding that ERISA preempted plaintiffs' state common law causes of action. We recognize that

"the preemptive effect of ERISA is broad, [but] it is not all-encompassing." *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984). ERISA is, however, broad enough to preempt the causes of action upon which plaintiffs sought to rely. *See Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982) (common law breach of contract cause of action preempted by ERISA); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (Congress had preempted state common law claims of tortious interference with employee benefit plans).

V. Demand for Jury Trial

The trial judge's decision to strike plaintiffs' demand for jury trial will be reversed upon a showing of abuse of discretion. *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 621 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980). Since plaintiffs did not request a jury trial before this case was removed from state court, Fed. R. Civ. P. 38(b), made applicable by Rule 81(c), required plaintiffs to demand a jury trial within ten days from the filing of the last pleading concerned with the issues for which trial by jury is sought. The last pleading was Del Monte's answer, filed December 23, 1982. Plaintiffs filed a demand for a jury trial on March 1, 1983, almost two months late. Failure to file within the time provided constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

Plaintiffs argue the district court abused its discretion in failing to grant relief from their unintentional waiver. The district court in its discretion may order a jury trial on a motion by a party who has not filed a timely demand for one. Fed. R. Civ. P. 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence. *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983). *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 675 (9th Cir. 1975) (the district court's discretion "should rarely be exercised to grant a trial by jury in default of a proper request for it"). Plaintiffs allege no reason for their failure to file a timely demand for jury trial. Nor is there an independent

constitutional or statutory right to jury trial in ERISA actions. *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States*, 627 F.2d 820, 828-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Thus, the district court did not abuse its discretion in striking plaintiffs' untimely demand for jury trial.

CONCLUSION

In light of the evidence of serious violations of ERISA by Del Monte, we find that Del Monte's decisions could not be said as a matter of law not to be arbitrary and capricious; because plaintiffs did not move for summary judgment, we need not decide whether plan administration so riddled with illegality makes the denial of benefits arbitrary and capricious as a matter of law. Hence, summary judgment was inappropriately granted at this stage of the proceedings. The grant of summary judgment is REVERSED and this cause is REMANDED to the district court for further proceedings upon plaintiffs' complaint.

Appendix D

United States Court of Appeals

For the Ninth Circuit

No. 83-2622
DC No. CV 82-6911 WHO

Barbara Blau, et al.,
Plaintiffs-Appellants,

v.

Del Monte Corporation, etc., et al.,
Defendants-Appellees.

ORDER

[Filed May 13, 1985]

Before: Duniway, Ferguson and Nelson, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Ferguson and Nelson voted to reject the suggestion for a rehearing en banc and Judge Duniway so recommended.

The full court has been advised of the suggestion for en banc hearing and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Upon vote of the eligible judges in active service, a majority failed to vote for en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix E

ERISA

29 U.S.C. § 1001:

"(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and

to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

"(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" (88 Stat. 832).

29 U.S.C. § 1002:

"For purposes of this subchapter:

"(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * * *

"(16)(A) The term 'administrator' means—

"(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

"(ii) if an administrator is not so designated, the plan sponsor; or

"(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

"(B) The term 'plan sponsor' means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * * *

"(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title" (88 Stat. 833).

29 U.S.C. § 1022:

"(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of

the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

"(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

"(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)" (88 Stat. 841).

29 U.S.C. § 1024:

* * * * *

"(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

"(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

> "(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or
>
> "(B) if later, within 120 days after the plan becomes subject to this part.

"The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

"(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the

plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

"(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

"(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence" (88 Stat. 847).

29 U.S.C. § 1102:

"(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

"(2) For purposes of this subchapter, the term 'named fiduciary' means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

"(b) Every employee benefit plan shall—

"(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

"(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

"(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

"(4) specify the basis on which payments are made to and from the plan" (88 Stat. 875).

29 U.S.C. § 1103:

"(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

"(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

"(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

"(b) The requirements of subsection (a) of this section shall not apply—

"(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

"(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

"(3) to a plan—

"(i) some or all of the participants of which are employees described in section 401(c)(1) of Title 26; or

"(ii) which consists of one or more individual retirement accounts described in section 408 of Title 26, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, whichever is applicable;

"(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this Act—

"(A) part 2 of this subtitle,

"(B) part 3 of this subtitle, or

"(C) subchapter III of this chapter; or

"(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of Title 26.

"(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter" (88 Stat. 876, 94 Stat. 1296, 1299, 1308).

29 U.S.C. § 1104:

"(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

"(A) for the exclusive purpose of:

"(i) providing benefits to participants and their beneficiaries; and

"(ii) defraying reasonable expenses of administering the plan;

"(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

"(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

"(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter" (88 Stat. 877, 94 Stat. 1296).

29 U.S.C. § 1132:

"(a) A civil action may be brought—

"(1) by a participant or beneficiary—

* * * * *

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * * * *

"(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section" (88 Stat. 891).

29 U.S.C. § 1133:

"In accordance with regulations of the Secretary, every employee benefit plan shall—

> "(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> "(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim" (88 Stat. 893).

29 Code of Federal Regulations

§ 2510.3-1:

"(a) *General.* (1) The purpose of this section is to clarify the definition of the terms 'employee welfare benefit plan' and 'welfare plan' for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition, the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3)

are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

"(2) The terms 'employee welfare benefit plan' and 'welfare plan' are defined in section 3(1) of the Act to include plans providing '(i) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).' Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter 'the LMRA') (other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

"(3) Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are '. . . holiday, severance or similar benefits'. Thus, the effect of section 3(1)(B) of the Act is to include within the definitions of

'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized)."

§ 2520.102-3:

"Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraph (j) through (n):

"(a) The name of the plan, and, if different, the name by which the plan is commonly known by its participants and beneficiaries:

"(b) The name and address of—

"(1) In the case of a single employer plan, the employer whose employees are covered by the plan.

"(2) In the case of a plan maintained by an employee organization for its members, the employee organization that maintains the plan.

* * * * *

"(c) The employer identification number (EIN) assigned by the Internal Revenue Service to the plan sponsor and the plan number assigned by the plan sponsor. (For further detailed explanation, see the instructions to the plan description Form EBS-1 and 'Identification Numbers Under ERISA' (Publ. 1004), published jointly by DOL, IRS, and PBGC);

"(d) The type of pension or welfare plan, e.g., for pension plans—defined benefit, money purchase, profit sharing, etc.,

and for welfare plans—hospitalization, disability, pre-paid legal service, etc.;

"(e) The type of administration of the plan, e.g., control administration, insurer administration, etc.;

"(f) The name, business address and business telephone number of the plan administrator as that term is defined by section 3(16) of the Act;

"(g) The name of the person designated as agent for service of legal process, and the address at which process may be served on such person, and in addition, a statement that service of legal process may be made upon a plan trustee or the plan administrator;

"(h) The name, title and address of the principal place of business of each trustee of the plan;

* * * * *

"(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraphs (j) (1) or (2) of this section as appropriate;

* * * * *

"(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a medical care plan, for example), only a general description is required if reference is made to detailed schedules of benefits which are available without cost to any participant or beneficiary who so requests;

* * * * *

"(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

* * * * *

"(s) The procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of Title I of the Act)."

§ 2560.503-1:

"(a) *Scope and purpose.* (1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as 'claims procedures.' Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

"(b) *Obligation to establish a reasonable claims procedure.* Every employee benefit plan shall establish and maintain reasonable claims procedures.

"(1) A claims procedure will be deemed to be reasonable only if it:

"(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section.

"(ii) Is described in the summary plan description, as required by § 2520.102-3.

"(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

"(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and paragraph (h) of this section.

* * * * *

"(d) *Filing of a claim for benefits.* For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

"(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

"(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

* * * * *

"(4) For purposes of paragraphs (d)(1), (2), and (3) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

"(e) *Notification to claimant of decision.* (1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

"(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e)(1) of this section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

"(3) For purposes of paragraphs (e)(1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the inital 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

"(f) *Content of notice.* A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

"(1) The specific reason or reasons for the denial;

"(2) Specific reference to pertinent plan provisions on which the denial is based;

"(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

"(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

"(g) *Review procedure.* (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

"(i) Request a review upon written application to the plan;

"(ii) Review pertinent documents; and

"(iii) Submit issues and comments in writing.

"(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the 'appropriate named fiduciary' for purposes of this section. In all other cases, the 'appropriate named fiduciary' for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

"(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

"(h) *Decision on review.* (1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

"(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

"(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

"(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

"(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review."

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No. 84-2009

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

DEL MONTE CORPORATION, a New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delavare corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioner,

v.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Did the Court of Appeals correctly hold that an employer's flagrant violation and total disregard of ERISA's reporting, disclosure and claims procedure provisions are probative as to whether the employer's decision to deny benefits provided for under an ERISA plan is arbitrary or capricious?

(2) Where an ERISA plan provides for severance pay when the employee's position is "eliminated" *and* alternative employment opportunities are unavailable *"within the corporation,"* can an employee who loses his position within the corporation as a result of the sale of the subsidiary he works for be denied severance pay based on the employer's secret intent, not expressed in the plan, to benefit only unemployed workers, if the employer has concealed the plan and deliberately failed to comply with any provision of ERISA?

(3) Did the Court of Appeals correctly hold that, in the circumstances outlined above, an administrator of an ERISA plan cannot restrict an employee's right to receive benefits by imposing eligibility conditions which are neither required by the terms of the plan nor disclosed to the employee?

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No. 84-2009

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Petitioner,

v.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
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DEL MONTE SNACKS, INC., similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

A. Introduction

Petitioners seek Supreme Court review on the ground that the Ninth Circuit Court of Appeals has created an unwarranted remedy for a mere procedural violation of ERISA. This argument, however, masks the true nature of both petitioners' illegal conduct and the Ninth Circuit's opinion. Del Monte Corporation did not, as petitioners suggest, simply commit "a" procedural

violation of ERISA[1]; it *completely ignored* each and every requirement imposed by ERISA and *intentionally concealed* the terms of the plan. On the issue of Del Monte's concealment and noncompliance, there is no contradiction in the record nor any dispute by petitioners. Under these circumstances, the Ninth Circuit held that the ambit of the administrator's discretion to interpret the plan under the arbitrary and capricious test must be circumscribed by the language of the plan itself and cannot be based on a secret purpose allegedly underlying the plan, not specified in and, indeed, contrary to its express provisions.

The particular severance plan at issue in this case does not postulate total unemployment as a condition to eligibility; on the contrary, it explicitly provides for severance benefits where an employee's position is eliminated and alternative employment is unavailable "*within the Corporation.*" (Emphasis added.)[2] Accordingly, the Ninth Circuit held that by reason of Del Monte's total disregard of all ERISA requirements, it could not interject an additional and contrary condition—the unavailability of a position with *any employer*—either by reference to its secret interpretation of the plan to that effect, or to its undisclosed practices at other subsidiaries allegedly based on that secret interpretation.

In the courts below, respondents urged that given the total disregard of ERISA and intentional concealment presented here, the deferential arbitrary and capricious test should not apply at all. The Ninth Circuit did not go that far. But to recede further from its decision, as petitioners ask of this Court, would emasculate ERISA and make a mockery of the underlying congressional

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[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., commonly referred to as "ERISA".

[2] The conditions of entitlement are consistent with a well-recognized purpose of such plans—to reward past services. *Petrella v. NL Industries*, 529 F. Supp. 1357, 1362 (D.N.J. 1982); *Dulany Foods, Inc. v. Ayers, Va.*, 260 S.E.2d 196, 202 (1979); *Dahl v. Brunswick Corporation*, 277 Md. 471, 356 A.2d 221, 226 (1976); *Chapin v. Fairchild Camera Etc. Corp.*, 31 Cal. App. 3d 192, 198-199, 107 Cal. Rptr. 111, 116 (1973).

intent, rewarding flagrant violations of the statute's reporting and disclosure provisions by allowing the employer the same full and unfettered discretion to "interpret" a secret plan by imposing additional conditions to eligibility (as long as such conditions were in some abstract sense "reasonable") as if the employer had fully and in good faith disclosed those conditions in compliance with ERISA.

At any rate, the Ninth Circuit's opinion, which interprets the wording of a *specific* benefit plan adopted by *one* company and addresses the novel situation in which "virtually every applicable mandate of ERISA" was violated, does not conflict with any decision of any other court. The *Blau* decision imposes no hardship on employers and, consistent with the settled law in the other circuits, fully preserves their rights under ERISA to reasonably interpret severance plans and to grant severance benefits under whatever conditions they see fit (including unemployment), *so long as* those interpretations and conditions are disclosed to the employees in compliance with ERISA. Del Monte proffers no excuse for its failure to even *attempt* to comply with ERISA and is not entitled to the time and sympathy of this Court, as if it were one of those blameless employers who, because "ERISA is a relatively complex piece of litigation [sic] with rapidly changing case law and regulations . . . [,] have not fully complied with its procedural provisions." (Petition, p. 5.)

B. Statement of Facts

1. Respondents' Claim for Severance Benefits

Respondents are a class of former salaried non-union employees of a Del Monte subsidiary previously known as Granny Goose Foods, Inc.[3] Effective December 13, 1980, Del Monte sold all of the subsidiary's assets to a corporation then known as Potato

[3] Citations herein to the record in the court below are to the excerpt of record (ER) and to various documents not contained in the excerpt of record which were transmitted to the Court of Appeals from the District Court. The opinion petitioners seek review of is printed in Appendix C of the Petition at pages A-20-35 and is cited in the format: Petition, p. A- .

Chips, Inc. (ER-453.)[4] As a consequence, respondents' employment by any Del Monte company was involuntarily terminated and their positions with any Del Monte company were eliminated. (Declaration of Lynne M. Jensen in Opposition to Defendants' Motion for Partial Summary Judgment, ¶ 1.) Respondents therefore sued to recover severance benefits pursuant to the uniform practice of Del Monte and Snacks of granting such benefits to every salaried non-union employee of Snacks who was involuntarily terminated in the eight years prior to the sale, regardless of whether the employee was thereafter unemployed. (ER-562.) After the instant action was commenced, respondents first discovered that Del Monte had a secret written "Separation Allowance Policy." (ER-563.)[5] Respondents claim that they are entitled to severance benefits under its terms.

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[4] Subsequent to this sale, the former Granny Goose Foods, Inc., *i.e.*, the seller corporation, changed its name to Del Monte Snacks, Inc. and Potato Chips, Inc., the buyer corporation, changed its name to Granny Goose Foods, Inc. (ER-3.) To avoid confusion between the two Granny Geese, throughout this brief respondents refer to the selling Del Monte subsidiary as Snacks and refer to the purchasing corporation as Potato Chips, Inc. Respondents are sometimes referred to as former employees of Snacks. The subject sale is referred to as the sale of Granny Goose.

[5] The manner in which the "Separation Allowance Policy" first surfaced is indicative of petitioners' credibility. Early in the case, petitioners moved to dismiss respondents' common law causes of action for severance benefits on the ground that they were preempted because Del Monte's severance plan was an ERISA plan. Petitioners, however, failed to attach the relevant plan to their moving papers or even mention that it existed. (*See* Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment and Declaration of James W. Farlow in Support thereof.) Instead, they attached a completely different plan—the Del Monte Retirement Plan. (*See* Exhibit A to Declaration of James W. Farlow.) When respondents protested that no plan should be ruled an ERISA plan until its terms were known, the "Separation Allowance Policy" appeared in public for the first time, accompanying petitioners' *reply* brief. (*See* Exhibit A to Further Declaration of James W. Farlow.) Petitioners' willingness to mislead not only their employees, but the courts, was thus evident from the outset of the litigation.

2. The Sale of Granny Goose

The decision to sell Granny Goose was part of a corporate reorganization of both Del Monte and its parent corporation, R. J. Reynolds. (ER-519-525.) Snacks' employees learned of the impending sale through newpaper accounts. (ER-563-564.) With four exceptions, none of them were offered the option of continued employment with Del Monte or any of its related companies after the sale. (ER-182-183.) As a result of the sale, respondents therefore lost their eligibility for the package of benefits provided by Del Monte to employees of its subsidiaries. (ER-454; Deposition of James Howell, p. 107.)[6] Moreover, respondents were never promised or guaranteed any employment with Potato Chips. (ER-526-534, 564.) The employees reported to the new employer without knowing whether they would be retained or what benefits they might receive. (ER-409-411.) Ultimately, Potato Chips did offer employment, albeit at significantly reduced benefits and job security. (ER-485, 565.)

3. The Severance Plan

The Del Monte "Separation Allowance Policy" is the only written document defining the terms and conditions of Del Monte's ERISA plan to provide severance benefits. (ER-235.)[7] The circumstances in which an employee is entitled to receive severance pay are set forth under two headings on a single page. The first heading, "Objective," provides:

> "This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for employees whose *positions are eliminated* as a result of reorganization, consolidation, or elimination of operations to which they have been assigned *and* for whom appropriate alternative employment opportunities *are un-*

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[6] Respondents did not lose the right to receive pension benefits which had already vested but, of course, could no longer accrue credited service under the pension plan. (ER-139, 212, 295-296, 478-479.)

[7] The text of the policy is included in the lower court's opinion. (*See* Petition, pp. A-21-23.)

available within the Corporation." (Petition, p. A-21, emphasis added.)

The second heading, "Eligibility," establishes only three exclusions: "employees subject to union negotiated termination allowance programs," "employees who have been discharged for cause" or "employees who have refused transfer to suitable positions . . . offered to them *by the Corporation*" are not entitled to severance pay. (Petition, pp. A-21-22; emphasis added.) Nothing in the policy indicates subsequent employment *outside* of Del Monte restricts the right to receive severance pay, nor is there any indication that the policy's purpose is to provide a form of unemployment compensation. (Petition, pp. A-29-30.) Further, there is no provision relating to terminations caused by sales of subsidiaries as a special case. (ER-296-297.)

4. Del Monte's Administration of the Severance Plan

Del Monte's administration of the severance plan was "riddled with illegality." (Petition, p. A-35.) Indeed, "[t]he undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA." (Petition, p. A-27.) The "Separation Allowance Policy" shows on its face that it was kept secret in violation of ERISA's reporting and disclosure provisions. (Petition, p. A-27, citing 29 U.S.C. §§ 1021-1031.)[8] Accordingly, it was never distributed to the employees, nor were they ever given any kind of written or oral summary or explanation of the plan's terms. (ER-563.) Specifically, no explanation of the application of the policy in the event a subsidiary was sold was provided and Del Monte's past practices in such transactions were never disclosed. (ER-563-564.)

Del Monte's severance plan was also deficient in other significant respects. In violation of ERISA, the policy names neither

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[8] The policy's heading states:

"CONFIDENTIAL (DISTRIBUTION *ONLY* TO CORPORATE OFFICERS AND CORPORATE EMPLOYEE RELATIONS STAFF MANAGERS)" (Original emphasis.)

Thus, not even the President of Snacks would have received a copy. (ER-373.)

trustees nor fiduciaries and fails to designate any plan administrator. (ER-315, 322-323; *see* 29 U.S.C. §§ 1022 and 1103.) Moreover, Del Monte completely ignored ERISA's mandate to establish a reasonable claims procedure for benefit determinations and failed to create any claims procedure *whatsoever*. (ER-315; Petition, p. A-27, citing 29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1(b)(1).)

Although Del Monte has attempted to divert the courts' attention from its flagrant violations of ERISA and play down their effect, its utter failure to comply with the reporting, disclosure and claims procedure requirements has never been contested nor has any excuse or explanation ever been presented. James Howell, Del Monte's ERISA compliance expert, simply claimed that the "Separation Allowance Policy" was the one exception to his responsibility. (ER-302-303.)

5. Respondents' Understanding of the Severance Plan

Because the "Separation Allowance Policy" was never distributed, respondents' understanding of the policy was based on their knowledge, obtained by word of mouth from fellow employees, that Del Monte granted severance pay to all involuntarily terminated employees of Snacks. (ER-394-395, 398, 404, 459-467, 562.) Based on their understanding, respondents fully expected that they would receive a separation allowance, both before and after they learned of the sale. (ER-387-388, 476-477, 564.) Respondents viewed severance benefits as a form of compensation for past services (ER-426) and Del Monte has also characterized them as such. (ER-510-511.) Further, Del Monte's practice directly influenced respondents to remain in Snack's employ rather than seek other employment. (ER-398-399, 474.) Prior to the sale, respondents were unaware that Del Monte had not granted severance pay to employees of subsidiaries it had previously sold. (ER-563-564.)

6. Del Monte's "Decision" to Deny Severance Benefits

Warren Hageman, then President of Del Monte, made the decision that respondents would not be given severance benefits. (ER-342.) At the time, he had never even seen the "Separation Allowance Policy." (ER-337-338.) Since Del Monte failed to

establish any claims procedure, the decision was made without considering any input respondents would have submitted. (ER-564-565.) After the decision was made, petitioners deliberately refrained from communicating it to the employees. (ER-529-530.) As Mr. Hageman's decision was unwritten, it is, of course, not supported by any contemporaneous reasoning or reference to the purportedly supporting plan provisions. The employees were never given any reason for the decision, except post-hoc, in the context of this litigation. (ER-565.)

C. Proceedings Below

The District Court,[9] after various prior rulings,[10] granted summary judgment for petitioners and held that, as a matter of law, Del Monte's decision to deny severance pay was not arbitrary and capricious. (*See* Petition, Appx. A, pp. A-1-3.) In so ruling, the District Court disregarded the intentional concealment of the plan, the complete violation of ERISA, the lack of any plan provision conditioning the right to severance benefits on unemployment and the plan's clear wording that severance benefits are payable if positions are eliminated and no comparable employment is available within the company, which conditions were both met in respondents' case. The Ninth Circuit, however, would not reward petitioners' violations of ERISA by allowing them to "go judicially unnoticed" (Petition, p. A-32) and reversed.

In essence, the Court of Appeals ruled that where an employer disregards ERISA and conceals the terms of an employee welfare benefit plan, (i) such flagrant illegal action is probative of and, in fact, may in itself be sufficient to establish arbitrary and capricious conduct (Petition, pp. A-10-13) and (ii) under such circumstances, in determining whether an employee is entitled to

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[9] Respondents brought this action in state court and petitioners removed it on the jurisdictional basis provided by ERISA, 29 U.S.C. § 1132(e)(1).

[10] The District Court previously granted partial summary judgment and dismissed all but the sixth cause of action (ER-44), struck respondents' demand for a jury trial (ER-47-51) and granted class certification (Order that Action Be Maintained as Class Action).

benefits under the plan, the employer is bound by its express terms and may not impose eligibility restrictions based on secret interpretations or undisclosed applications of the plan in transactions involving other subsidiaries. (Petition, pp. A-15-17.) Consistent with these principles, the Ninth Circuit also ruled that under the express language of *the particular plan here,* total loss of employment is *not required* in order to be eligible for severance benefits, which are payable if an employee loses his or her position *with Del Monte* and no alternative employment is available *within that company.* (Petition, pp. A-13-15.)

The Court of Appeals found ample support for its decision in the policies underlying ERISA, indeed, finding that "the evils against which ERISA was enacted to guard—insecurity, lack of knowledge, and inability to police plan administration—are just the evils that appear in Del Monte's administration of its plan." (Petition, p. A-32.) Thus, petitioners' claim that its severance plan was actually intended to provide a form of unemployment compensation was not controlling, because "to refer to the secret intent behind a secret plan to determine whether the denial of severance benefits in this case was not arbitrary and capricious . . . would only encourage violation of ERISA's reporting and disclosure requirements . . . " (Petition, pp. A-31-32.)

SUMMARY OF ARGUMENT

For the reasons explained fully below, there is no reason that certiorari should be granted in this case. Contrary to petitioners' assertions, the Ninth Circuit's opinion does not conflict with the decision of any other circuit, because it does *not* hold that "a" procedural violation gives rise to a cause of action under ERISA even where the employee has suffered no economic harm. In fact, the court found that the magnitude of petitioners' violations *did* cause respondents to suffer substantive harm. The record fully supports that finding: respondents, who reasonably viewed severance benefits as compensation for past services, were denied those benefits based on petitioners' interpretation and intent, kept secret in violation of ERISA, that severance pay was meant to be some kind of unemployment benefit.

Nor does the Ninth Circuit's opinion conflict with the decision of any other circuit with respect to the question of whether severance benefits must be paid when a business is sold as a going concern. The instant decision, which interprets a different severance plan with different terms than those construed by other courts, establishes no requirements generally applicable to such sales. Rather, it simply rules that where an employer totally violates ERISA, severance benefits cannot be denied on the grounds that they are conditioned upon unemployment, where that condition is both concealed from the employees and contrary to the terms of the plan. Nothing is novel in that ruling; numerous courts have recognized that to deny employees benefits based on unwritten, undisclosed eligibility requirements is fundamentally unfair and thwarts the core purposes of ERISA.

The intervention of this Court for fear that the wide latitude ERISA affords employers will be disturbed is entirely unnecessary. Employers can continue, under the Ninth Circuit's opinion, to enforce any reasonable interpretation of a benefit plan administered in compliance with ERISA. None of the cases or arguments petitioners present provide any legitimate reason for this Court to extend the statute's protection to employers who, like Del Monte, have deliberately flaunted the protections Congress intended to afford employees. That would be the precise effect of reversing the Ninth Circuit's opinion.

I

THE NINTH CIRCUIT'S DECISION DOES NOT PERMIT EMPLOYEES TO RECOVER BENEFITS TO WHICH THEY WOULD NOT OTHERWISE BE ENTITLED, BUT FOR A PROCEDURAL VIOLATION OF ERISA. TO THE CONTRARY, THE COURT HELD THAT RESPONDENTS ARE ENTITLED TO SEVERANCE BENEFITS UNDER THE TERMS OF THE PLAN. WHAT WAS ARBITRARY AND CAPRICIOUS WAS THE EMPLOYER'S VIOLATION OF ERISA, COUPLED WITH AN ATTEMPT TO INTERJECT A NEW AND CONTRADICTORY CONDITION OF ELIGIBILITY INTO THE CONCEALED PLAN.

Petitioners construe the Court of Appeals' opinion to hold that an employee may sue to recover benefits provided under an ERISA plan based on "a" procedural violation of the statute "*even though the employee would not otherwise be entitled to the claimed benefits.*" (Petition, p. 6; emphasis in original.) Having created this "strawman" holding, petitioners go on to attack it on the basis that it conflicts with decisions of other circuits that a procedural violation of ERISA gives rise to a cause of action only if it causes economic injury to the employee. (Petition, p. 7.) Petitioners' analysis, however, fails on three counts: (i) it ignores the court's justifiable holding that, under the express terms of the plan, respondents *are* entitled to benefits; (ii) it misconstrues the record by assuming that respondents did not suffer any injury where, in fact, the record is replete with evidence that respondents were harmed; and (iii) it artfully ignores the gross nature of Del Monte's violations of ERISA.

Although a reading of the petition alone would suggest otherwise, the analysis of the Ninth Circuit resulting in the determination that respondents are entitled to severance pay does not begin and end with the finding that Del Monte violated ERISA. Rather, after concluding that "the type of plan administration practiced by Del Monte is highly probative of whether a particular decision to deny benefits . . ." was arbitrary and capricious and that "this factor weighs heavily against Del Monte," (Petition, pp. A-28-29), the court goes on to carefully scrutinize the terms contained

in the plan and holds that Del Monte's interepretation cannot be sustained under ERISA because it "imposed several standards not required by the severance policy." (Petition, p. A-29.)

As the court observed, the plan provides for severance pay when "jobs are 'eliminated' "[11] and "alternative *employment opportunities are unavailable within the Corporation.*" (Petition, p. A-29; emphasis court's.) Nothing in this, or any other language in the plan, says anything about unemployment. (Petition, p. A-29, n.2.) Further, the policy excepts only three specific classes of employees from eligibility (*ibid.*), none of which include employees who are subsequently hired, let alone hired by a company which purchases a subsidiary from Del Monte.[12]

In sum, as the Ninth Circuit found, "[t]he plan does not condition receipt of severance benefits upon elimination of positions from the face of the earth . . . does not condition receipt of benefits upon employees' subsequent employment . . . [and] does not condition receipt of benefits upon failure of a successor corporation to offer jobs after their employment with Del Monte ceases . . . The plan specifies only that the job be 'eliminated' and that alternative Corporation jobs be unavailable." (Petition, p. A-30.) Accordingly, Del Monte's decision was rejected because "*no permissible construction* of 'eliminated' permits us to imply other conditions into the plan, as Del Monte would have us do." (Petition, p. A-30; emphasis added.) Far from ruling that a

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[11] Del Monte asserts that the Ninth Circuit somehow erred in characterizing the Del Monte plan as dependent upon "job" elimination rather than elimination of "employment positions." (Petition. pp. 11-12, n.11.) The tenuous and sophistic distinction to be drawn between a "job" and an "employment position" escapes respondents. At any rate, the plan's intent to benefit employees who lose their jobs (or even "employment positions") *at Del Monte* is made clear by the key phrase, *conveniently omitted from petitioners' argument* (*see* Petition, p. 11) "and for whom appropriate alternative employment opportunities are unavailable *within the Corporation.*"

[12] The third exception to eligibility—employees who refuse transfer to positions "offered to them *by the Corporation*"—reinforces the conclusion that an offer of employment by a *different* employer does not result in a loss of the right to receive severance benefits.

procedural violation entitles the employees to benefits they would not "otherwise be entitled to," the Ninth Circuit found that respondents' right to severance pay was founded upon the plain language of the plan and that the multifold procedural violations precluded modification of the plan by interjection of new and inconsistent conditions, based upon undisclosed interpretations and past practices at other subsidiaries.[13]

Petitioners' further contention that respondents suffered "no injury" by reason of Del Monte's multiple violations of ERISA's reporting and disclosure requirements (Petition, pp. 7-9) is likewise meritless as it is unsupported by either the Court of Appeals' opinion or the record. This so-called "windfall" argument proceeds from the mistaken premise that severance pay is solely intended as a type of unemployment benefit.[14] Of course, that

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[13] The Ninth Circuit's determination that respondents' positions were eliminated as a result of the sale of Granny Goose is supported by numerous other decisions regarding such divestitures. *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (positions within selling company eliminated as a result of a sale of its division as a going concern); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir. 1985). (provision providing for severance pay "when company terminates the employer-employee relationship," does not specify "a period of unemployment as a condition precedent to receiving severance pay benefits"); *Livernois v. Warner Lambert Co., Inc.*, 723 F.2d 1148, 1154, n.8 (4th Cir. 1983) (divestiture of division, if it eliminated selling company's liability to employees, "terminated their employment, eliminated their jobs . . ."); *Petrella v. NL Industries*, 529 F. Supp. 1357, 1360 (D.N.J. 1982) (employees of division may have been entitled to severance benefits under employers' practice of paying the same to "every previously terminated employee . . .)"; *Chapin v. Fairchild Camera Etc. Corp.*, 31 Cal. App. 192, 199, 107 Cal. Rptr. 111, 116 (1973) (employment with seller involuntarily terminated.)

[14] ERISA clearly distinguishes between unemployment benefits and severance benefits. Under section 1002(1), an employee welfare benefit plan includes

> "any plan, fund, or program . . . for the purpose of providing . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or *unemployment*, or vacation benefits, apprenticeship or other training programs, or day

premise is inconsistent with the plan's express terms, the court's interpretation of the plan's terms, respondents' perception of the benefits as a form of compensation for past services (ER-426) and even with Del Monte's own interpretations and administration of the plan[15] and characterization of the benefits provided thereunder. (ER-510-511.)

Respondents' belief that severance pay was to be given in recognition of past services is entirely reasonable: other courts have similarly described them. *See, e.g., Petrella v. N.L. Industries,* 529 F. Supp. 1357, 1362 (D.N.J. 1982) (affadavits supported finding that severance benefits provided as a form of "farewell bonus"); *Chapin v. Fairchild Camera Etc. Corp.,* 31 Cal App. 3d 192, 198-199, 107 Cal. Rptr. 111, 116 (1973) (stating that "[s]eparation pay is a kind of accumulated compensation for past services and a material recognition of their past value.")

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care centers, scholarship funds, or prepaid legal services, or (B) *any benefit described in section 186(c) of this title* . . . ." (Emphasis added.)

As the Court of Appeals observed, severance plans fall under ERISA because they are described in section 186(c) (Petition, p. A-25, citing 29 C.F.R. § 2510.3-1(a)(3)), rather than because they are unemployment benefits included in subsection (A) of section 1002(1).

[15] Notably, Mr. Hageman, the person who decided that respondents were not entitled to severance benefits, admitted that if Granny Goose had been closed rather than sold and on the very next day all of the employees obtained a job with a company totally unrelated to Del Monte, they would have received severance pay. (ER-337.) This is hardly consistent with petitioners' assertions that the plan was intended "to tide them [the employees] over during their periods of unemployment" (ER-236) except perhaps "based on Del Monte's secret distinctions and conditions." (Petition, p. A-33.) Moreover, under the "Separation Allowance Policy" the amount of severance pay depends on the length of employment with Del Monte, plainly recognizing the employee's *past services,* rather than the anticipated duration of unemployment. Finally, separation allowances were normally paid in a lump sum (ER-370), and there is no evidence that Del Monte ever inquired into the subsequent employment status of employees given severance pay or, as to employees paid in installments, terminated their benefits if they found a new job.

Viewed in that manner, as respondents did, granting severance benefits is not a windfall, it is an *entitlement.*[16] In fact, to rule that severance benefits were not required where, by the very terms of the plan they are *not* tied to unemployment, would result in windfall to petitioners.

Petitioners's claim that there is no causal link between the damage respondents suffered and Del Monte's flagrant procedural violations is unfounded; in fact, the record shows that the intentional concealment of the plan and its interpretations caused respondents to suffer the *very injury Congress intended to avert in requiring full disclosure.*

> "It is grossly unfair to hold an employee accountable for acts which disqualify him for benefits, *if he had no knowledge of those acts,* or if the conditions were stated in a misleading or incomprehensible manner in plan booklets." H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4646 and 4847; emphasis added.

Here, based on their knowledge of Del Monte's uniform practice of granting severance pay to all previously involuntarily terminated employees of Snacks, respondents fully expected to all receive severance benefits, both before and after learning of the impending sale. (ER-387-388, 476-477, 564.) Further, the conditions which Del Monte would engraft upon its secret plan—"unemployment" and "no offer of employment by the

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[16]In addition, providing severance benefits to respondents does not result in a windfall simply because the new employer offered them jobs, since, contrary to petitioners' assertions, respondents *were* harmed as a result of the sale. Unlike Del Monte, Potato Chips offers no retirees' health insurance, has a pension plan only "in theory" (ER-485) and provides less job security. (ER-565.) Further, the employees who were terminated by Del Monte just short of qualifying for early retirement benefits under the Del Monte Retirement Plan suffered serious financial damage. (ER-212, 416, 478-479.) And even if a windfall did result, the fault would lie solely with petitioners and not the Court of Appeals; petitioners were the ones that concealed their interpretation of the plan and failed to draft it in accordance with that interpretation. *Cf. Richardson v. Cent. States, Southeast & Southwest,* 645 F.2d 660, 663 (8th Cir. 1981).

purchasing corporation"—were not merely stated "in a misleading or incomprehensible manner" but rather were not stated (or even explained) at all. (*Ibid.*) Thus, as a result of Del Monte's fundamental violations of ERISA, respondents were denied any knowledge of the plan's terms and denied any opportunity to participate in the decision process. Under these circumstances, Del Monte's decision cannot be seen as anything other than arbitrary and capricious.

The substantive harm which the Court of Appeals found petitioners' procedural violations could work is hardly "amorphous." (*See* Petition, p. 8.) Because petitioners actively concealed their interpretations of the plan, respondents were misled into believing that they would be given severance pay.[17] To therefore require the payment of benefits, rather than allow the employer to rely on undisclosed conditions and undisclosed practices, is consistent with ERISA and, indeed, with any reasonable notion of justice and does not create a "needless employee

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[17] The injury respondents suffered in being denied severance benefits also resulted from Del Monte's violations of the claims procedures, *i.e.*, its complete failure to establish any. There is no evidence that Mr. Hageman was aware of his fiduciary duties to respondents imposed by ERISA or even that he was a fiduciary. Moreover, *Mr. Hageman made his decision without ever having read the policy* (ER-337-338), much less making written reference to the pertinent plan provisions as required by ERISA (*see* 29 C.F.R. §§ 2560.503-1(f) and (g)) and without considering any evidence or arguments from respondents. (ER-564-565.) Indeed, Mr Hageman flatly admitted, "I didn't use [. . . the Separation Allowance Policy] in making a decision on separation pay." (ER-344.) Whether Mr. Hageman would have reached the same decision had Del Monte adhered to a claims procedure in compliance with ERISA can only be answered, in the Court of Appeals' words, "through the cost-benefit analysis of hindsight." (Petition, p. A-32.) Petitioners' claim that "the denial of benefits results from interpretation of the plan, not from any claimed procedural violations" (Petition, p. 9, n.7) is mere surmise and demonstrates their continued disparagement of the importance specific procedures play in influencing a substantive decision. Surely that is the reason that Congress endeavored to require them under ERISA.

remedy" for an "irrelevant" procedural violation. (*See* Petition, p. 9.)[18]

Nor does the Ninth Circuit's decision create a disincentive for the continuation of voluntary ERISA plans. (*See* Petiton, p. 9.) The opinion, which relates only to the situation in which an employer deliberately flaunts ERISA's procedural requirements, carefully observes that "ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans," (Petition, p. A-28). The court also takes note: "[A] claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy . . . in the ordinary case." (*Ibid.*) But this clearly is not the ordinary case. Hence, the opinion does preclude an employer from denying benefits on the basis of conditions which are concealed from the employees, as well as absent from and inconsistent with the written plan. But since ERISA already requires full reporting and disclosure (§§ 1021-1031) and administration "in accordance with the documents and instruments governing the plan" (§1104(a)(1)(D)), that result creates no more of a disincentive than the statute itself.

In short, rather than creating disincentives to continue voluntary ERISA severance benefit plans, the Ninth Circuit opinion merely instructs employers who would rely on broad deference under the arbitrary and capricious test to do a few simple things:

1. Comply with the law or at least attempt to do so;

2. Disclose, rather than conceal, the plan and any unwritten conditions;

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[18] Other Courts have also found that a remedy for failure to comply with ERISA's disclosure requirements is necessary to preserve "Congress's intent to prevent inequities stemming from employers' failure to apprise employees of the essential provisions of their benefit plans." *Gors v. Venoy Palmer Market,* 578 F. Supp. 365, 368-369 (E.D. Mich. 1984); *Hillis v. Waukesha Title Co.,* 576 F. Supp. 1103, 1107-1110 (E.D. Wis. 1983). Total non-compliance with ERISA and intentional concealment of the plan surely constitute more than an "irrelevant" procedural violation.

3. If it is intended to disqualify employees from benefits, word the plan accordingly; at least, do not provide exactly to the contrary.

Respondents suggest these simple rules do not constitute any novel proposition of law, extraordinary interpretation of ERISA or radical departure from other cases interpreting ERISA, nor do they establish any policy likely to frustrate the legitimate goals of well-meaning employers who in good faith try to comply with the law. Rather, it is the unstated premise underlying petitioners' argument that is radical. They, in essence, would have this Court hold that there is an invariable *substantive* requirement under ERISA mandating that no separation benefits are allowable upon the sale of a subsidiary where the employees remain employed with the purchaser, *regardless* of the wording of the plan and regardless of the conduct of the employer.

II

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS ARE ENTITLED TO SEVERANCE BENEFITS DOES NOT CONFLICT WITH THE *SLY* OR *ANDERSON* CASES

Petitioners assert that certiorari should be granted because the Ninth Circuit's decision in *Blau* purportedly conflicts with the decisions of two other circuits—*Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985) and *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983). But comparison of the cases reveals only that they are accordant on the law and distinguishable on the facts. Thus, any further review by the Court is unnecessary.

First, petitioners suggest that a conflict exists because the Ninth Circuit held as a general proposition that severance benefits are payable when a business is sold and the employees are retained by the purchaser. (*See* Petition, p. 5.) The decision, however, makes no such statement and is confined to the plan and facts at issue. This is clearly demonstrated by *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), decided only one week later, wherein the court held that under the plan and facts there at

issue, the employees were *not* entitled to severance pay when the division they worked for was sold and they were hired by the purchaser.

Next, petitioners assert that *Blau* somehow conflicts with *Anderson's* holding that the arbitrary and capricious standard of review pertains, notwithstanding the employee's procedural violations in an ERISA plan's management. (Petition, p. 7.) Of course, *Anderson* expressly observes that the Ninth Circuit applied that same test. 759 F.2d at p. 1521. *(See* Petition, p. A-26.) Nor is the application of that test any different. *Anderson,* like *Blau,* acknowledges that the employer's good faith in interpreting the plan is a component of the arbitrary and capricious test. 759 F.2d at p. 1522. In *Anderson,* however, the person who interpreted the plan "did nothing that could be characterized as having been done in bad faith." *Ibid.* In contrast, the evidence of petitioners' bad faith in interpreting the plan was overwhelming. (*Infra,* p. 23.)

Further, *Anderson* and *Blau* are distinguishable because, as the *Anderson* court correctly points out, the plans in the two cases are distinguishable. 759 F.2d at p. 1523. The plan at issue in *Anderson* contained an express "special situation" provision which made the policy inapplicable where the employer "deemed[ed] it necessary to establish a separate policy applicable to that situation only." *Id.*, at p. 1520. Significantly, this provision *had* been disclosed to the employees as it was contained in their employee handbooks.[19] Thus, in light of the broad discretion the "special

---

[19] Del Monte notes that the plan documents reviewed in *Anderson* did not specifically state that termination of an employee who went to work at a purchasing company was a circumstance that might result in denial of benefits. (Petition, p. 7, citing 759 F.2d at p. 1521.) But, as distinguished from the case at bar, a summary of the plan had been distributed to the employees and it included the provision the employer relied on in denying benefits. Thus, it would have been reasonable for the court to conclude that although the employer violated ERISA, it had still acted in good faith and that the employees were nonetheless on notice that severance benefits would not be paid. *(Ibid.)* Petitioners' utter disregard for ERISA, including a conscious decision to exclude any description of the plan from the employee handbook (ER-374-376),

situation" provision plainly granted the administrator, the court justifiably concluded that the denial of benefits in that case was not arbitrary and capricious. 759 F.2d at p. 1522. But in this case, the policy contains no provision even remotely similar to that at issue in *Anderson,* much less one that was disclosed.

The Ninth Circuit's construction of the Del Monte plan is actually bolstered by *Anderson.* The employer in *Anderson* alternatively sought to support its decision to deny severance pay on the ground that it had not "terminated the employer-employee relationship" as required by the policy for entitlement to benefits. 759 F.2d at p. 1521. The court rejected that justification, holding that because "the plan never specified a period of unemployment as a condition precedent to receiving severance pay benefits . . . [p]laintiffs were 'terminated' for severance pay purposes." *Ibid.,* citing *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1354-55 (9th Cir. 1984). Thus, *only* the interpretation based on the "special situation" provision was affirmed.

The *Sly* case is also distinguishable. There, the court, relying on language in the policy stating it was "intended to cover separation caused by reduction in force or position elimination . . . ." (712 F.2d at p. 1212) concurred in the district court's observation that "positions were eliminated within Mallory due to the sale of the Metallurgical Division . . . ." *Id., at* p. 1211; emphasis added. This, of course, is consistent with *Blau.* But, unlike the Del Monte policy, the policy reviewed in *Sly* did *not* contain the key conjunctive phrase "and for whom appropriate alternative employment opportunities are unavailable *within the Corporation.*" (Emphasis added.) Accordingly, the court determined that the policy was meant to apply only to unemployed persons based on other provisions and "read as a whole . . . ." *Ibid.*

In contrast to the policy reviewed in *Sly,* the "other provisions" of Del Monte's severance plan reinforce the conclusion that severance benefits are not tied to unemployment. Specifically, none of the eligibility limitations in the Del Monte plan refer to

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cannot similarly be considered a technical or good faith violation, and, in intentionally concealing the entire plan, they failed to place respondents on notice of *any* basis for denying severance benefits.

unemployment. Moreover, the reference to positions "within the Corporation" in both the "Objective" and "Eligibility" sections confirms that the right to severance pay turns on the employee's loss of a position at *Del Monte,* rather than the complete loss of work. (*Infra,* pp. 5-6 and 12; *see* Petition, pp. A29-30, n.2.)

In sum, the *Sly* court, like the Ninth Circuit in *Blau,* looked to the plan to determine its intent. The Seventh Circuit found in the provisions of the plan before it an intent that benefits be paid only in the event of unemployment. The *Blau* court, interpreting different provisions, correctly determined that the Del Monte plan not only lacked such a condition but provided to the contrary. This difference in interpretation of different documents hardly seems worthy of Supreme Court review.[20]

III

THE NINTH CIRCUIT APPLIED THE ARBITRARY AND CAPRICIOUS TEST IN A MANNER CONSISTENT WITH THAT OF OTHER COURTS

Petitioners do not contest the Court of Appeals' statement of settled law that an administrator's decision with respect to an ERISA plan may be reversed if it is "arbitrary, capricious, made in bad faith, not supported by substantial evidence or erroneous on a question of law." (Petition, p. A-26.) Rather, they contend that the court "redefined" the test by holding that the plan administrator acts arbitrarily and capriciously if it applies an

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[20] Evidently the *Sly* court was not called upon to evaluate the ramifications of the employer's apparent procedural violations of ERISA, for it certainly did not address the issue. Since the decision is silent on the point, it can hardly be said to conflict with the Ninth Circuit's opinion in *Blau.* At any rate, *Sly* acknowledges that the administrator's decision can be reversed under the arbitrary and capricious test if it is in bad faith (712 F.2d at p. 1211) but found that the plan had been administered in good faith. *Id.,* at p. 1213. However, as indicated by the Ninth Circuit, "Del Monte's administration, in contrast, was characterized by so many ERISA violations that it is impossible to hold, as a matter of law, that the administration was not arbitrary and capricious." (Petition, p. A-29, n.1.)

"interpretation" not required by the plan. (Petition, p. 10.) But again, petitioners misstate the Court of Appeals' opinion, which held, in essence, that since Del Monte had not complied with ERISA in any respect, and, since the plan's express terms provided for benefits, the employer could not interject different and secret *conditions* unless required by the language of the plan itself. As explained below, the Ninth Circuit's holding that such flagrant violations of ERISA precluded affirming Del Monte's decision to deny benefits under the arbitrary and capricious test is fully consistent with the decisions of courts in other circuits which have applied that standard of review.

The court first ruled that Del Monte's decision to deny benefits could not survive even the deferential arbitrary and capricious standard because "it was made in the course of, and could have been infected by, these ERISA violations." (Petition, p. A-27.) This ruling flows from the same conclusion reached by many courts, namely, that "in reviewing an administrator's decision, the court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary or capricious." (Petition, p. A-28.)[21] Indeed, numerous cases have held a trustee's decision insufficient to satisfy the arbitrary and capricious test due to a procedural violation.[22]

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[21] The court alternatively stated its ruling: "[w]e hold that the type of plan administration practiced by Del Monte is highly probative of whether its decision to deny benefits was infected by having been made in conformity with the objectionable scheme." (Petition, pp. A28-29.)

[22] *See, e.g., Toland v. McCarthy,* 499 F. Supp. 1183, 1190 (Mass. D. 1980) (trustee rendered decision without developing or considering reasonably available evidence bearing on employee's claim); *Wolfe v. J.C. Penny Co., Inc.,* 710 F.2d 388, 393 (7th Cir. 1983) (trustee failed to give reason for denial or inform employee of information necessary to perfect claim or of means to appeal); *Richardson v. Cent. States, Southeast & Southwest,* 645 F.2d 660, 665 (8th Cir. 1981) (trustee failed to give supporting rationale for decision in opinion form); *Grossmuller v. Budd Co. Consol. Retirement, Etc.,* 547 F. Supp. 111, 114-116 (S.D. Pa. 1980), *modified* 715 F.2d 853 (employee not informed of accusations or evidence underlying decision or opportunity to rebut same).

Petitioners assert that the Ninth Circuit's reliance on blatant violations of ERISA as a basis for holding that Del Monte's decision did not satisfy the arbitrary and capricious test somehow conflicts with the Eleventh Circuit's statement of law in *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir. 1985) that the issue under the arbitrary and capricious test is whether the "interpretation was made rationally and in good faith." (*See* Petition, p. 9.) But the *Blau* and *Anderson* decisions are entirely harmonious—Del Monte's procedural violations provided overwhelming evidence of its bad faith in "interpreting" the plan.

The Del Monte "administrator" based his unwritten decision to deny benefits on an undisclosed, unwritten interpretation of a policy intentionally concealed from the employees, without even bothering to read it. Moreover, despite their obvious awareness of the employees' concerns regarding severance pay (ER-355-356), petitioners never took the trouble to announce that decision (ER-563), much less provide the employees any avenue of redress. (ER-564.)[23]

Del Monte's decision to deny benefits was also ruled arbitrary and capricious, because it "imposed several standards not required by the severance policy." (Petition, p. A-20.) This application of the arbitrary and capricious test is also consistent with that

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[23] Petitioners contend that all this is insufficient to show their bad faith because the "question focuses on the evenhandedness of the employer's action," which is allegedly demonstrated here by their consistent past practice. (Petition, p 12.) The contention is easily disposed of: evenhandedness of treatment is not the *only* factor relevant to the issue of bad faith. *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314-315 (5th Cir. 1982), specifically cited for this point in *Anderson*, identifies *several* pertinent factors including the "factual background of the determination by a plan and inferences of lack of good faith, if any" and proceeds to state, "[w]hile it is true that differentiated treatment could be indicative of arbitrary and capricious action, the opposite proposition, that uniformity establishes the absence of arbitrary and capricious conduct, is not necessarily true." Simply put, arbitrary and capricious conduct does not become reasonable simply by being repeated. *C.f. Morgan v. Mullins*, 643 F.2d 1320, 1324, n.4. (8th Cir. 1981).

of the other circuits. *Maness v. Williams,* 513 F.2d 1264, 1267 (8th Cir. 1975) (imposing standard not required by plan "would result in unwarranted arbitrary construction of plan); *accord Morgan v. Mullins,* 643 F.2d 1320, 1321 (8th Cir. 1981); *Dennard v. Richards Group, Inc.,* 681 F.2d 306, 314 (5th Cir. 1982); *Miles v. New York State Teamsters Conference, Etc.,* 698 F.2d 593, 599 (2d Cir. 1983), *cert. den.* ____ U.S. ____, 104 S. Ct. 105 (1984); *Ganze v. Dart Industries, Inc.,* 741 F.2d 790, 793 (5th Cir. 1984); *see also Snackard v. Commission House Drivers Union,* 647 F.2d 721, 713 (6th Cir. 1981) (trustee violated ERISA by adding rule where plan silent on question.) Indeed, to hold that the arbitrary and capricious test affords an employer-administrator such broad discretion that it can impose eligibiltiy conditions without any foundation in the language of the plan would conflict with the statutory requirement that a fiduciary must discharge his duties "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D).

Furthermore, the Ninth Circuit's opinion does not deprive the administrator of the discretion to make *reasonable* interpretations of the plan. The court's discussion makes it clear that Del Monte's interpretation was *not* reasonable; *first,* because the interpretation was contrary to the language of the plan itself and, *second,* because neither the plan's interpretation and the secret intent underlying that interpretation were ever discosed to respondents. Thus, the court stated, "*[n]o permissible construction* of 'eliminated' permits us to imply other conditions into the plan, as Del Monte would have us do." (Petition, p. A-30; emphasis added.) Indeed, respondents submit that to read in additional conditions to eligibility expressed nowhere in plan language would *a fortiori* constitute an unreasonable interpretation.[24]

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[24] Notably, ERISA requires disclosure of "the plan's requirements respecting eligibility for participation and benefits . . . [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . . ." 29 U.S.C. § 1022(b). To impose eligibility requirements which are not disclosed would deprive this statute of any significance.

Finally, the Ninth Circuit's refusal to interpret the plan with reference to Del Monte's secret intent and undisclosed past practices, of which respondents were not aware, is completely consistent with the case law interpreting ERISA.[25] More significantly, that ruling is essential to preserve the congressional intent underlying the ERISA disclosure requirements "to prevent . . . the inequities that stem from a plan administrator's failure to apprise participants of the essential provisions of their benefit plans . . . ." *Hillis v. Waukesha Title Co., Inc., supra,* at pp. 1103, 1107; *see also* H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 4639, 4646 and 4649; *Wadsworth v. Whaland,* 563 F.2d 70, 73-74 (1st Cir. 1977).

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[25] *See e.g., Morgan v. Mullins,* 643 F.2d 1320, 1324, n.4 (8th Cir. 1981) (trustee's consistent interpretation not controlling where documents explaining requirements to employees did not discuss interpretations); *Petrella v. NL Industries,* 529 F. Supp. 1357, 1362 (D.N.J. 1982) (employees guaranteed employment by company purchasing division may have been entitled to severance benefits where all previously terminated employees granted severance benefits "as a form of farewell bonus" notwithstanding internal policy statement that severance pay was to provide employees financial resources while unemployed); *Hillis v. Waukesha Title Co.,* 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) (holding forfeiture clause cannot be enforced against plan participant who is reasonably unaware of clause where plan administrator fails to take steps to advise participant of clause); *Palino v. Casey,* 664 F.2d 854, 859 (1st Cir. 1981) (trustees subject to limits of fundamental fairness, which are exceeded when eligibility rules changed without notice); *Valle v. Joint Plumbing Industry Bd.,* 623 F.2d 196, 203 (2d Cir. 1980) (extent to which trustee has notified employee of changes in rules is factor in determining whether application of new eligibility requirement was arbitrary and capricious.) To the extent the Ninth Circuit's opinion might be read to suggest that an employer's interpretation of a plan should be subject to closer scrutiny by the reviewing court under the arbitrary and capricious test where the decision is made in the course of plan administration in total violation of ERISA, it is also consistent with existing case law. *See Maggard v. O'Connell,* 671 F.2d 568, 571-573 (D.C. Cir. 1982).

CONCLUSION

Under *Blau*, the Ninth Circuit will, like other circuits, continue to defer to an employer's reasonable interpretation of the terms and conditions of an ERISA plan which have been disclosed to the employees. The *Blau* decision merely stands for the proposition that, in applying the arbitrary and capricious standard, courts need not also defer to an employer's undisclosed interpretation based on an undisclosed purpose, which is contrary to the language of the plan, where the employer conceals the plan and defies ERISA. No principle of law requires any other result. Accordingly, respondents respectfully submit that the petition for a writ of certiorari should be denied.

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No. 84-2009

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

DEL MONTE CORPORATION, A New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioners,

v.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE BRIEF, AMICUS CURIAE, AND BRIEF OF ORGANIZATION RESOURCES COUNSELORS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE BRIEF, AMICUS CURIAE

Organization Resources Counselors, Inc. (ORC) respectfully requests leave of the Court to file a brief as amicus curiae in the above-captioned action.[1] A copy of the brief is bound with this motion. As grounds for its motion, ORC states as follows:

1. The case at bar is an action by nonunion salaried employees of Granny Goose Foods, Inc. (Granny Goose) for "severance" benefits allegedly due as a consequence of

[1] Pursuant to Court Rule 36.1, ORC sought the consent of counsel for petitioners, Walter R. Allen, and counsel for respondents, John J. Vlahos, to the filing of the brief. Counsel for the petitioners consented; counsel for the respondents did not.

the sale of Granny Goose by Del Monte to independent investors, though these employees retained their same jobs at the same rates of pay without interruption.

2. ORC is a world-wide management consulting firm which specializes in employment relationships and the utilization of human resources. ORC provides consulting services to over 200 of the nation's major employers. These employers are representative of every major segment of American business and of all areas of the country. Representatives of those employers meet regularly with ORC to review current developments, to exchange information on current issues and concerns and to examine the effects of governmental and judicial initiatives. These employers have approximately 6.1 million employees and annual sales of approximately $1600 billion. They sponsor over 3600 employee benefit plans, each of their employees being a participant in several plans. ORC's continual and regular contact with this large number of major corporate organizations generates considerable data and provides ORC with insight into the problems and concerns of American businesses. The views of ORC as amicus curiae generally reflect those concerns.

3. The day-to-day administration of those 3600 employee benefit plans as well as other plans could be affected if the approach to the interpretation of employee benefit plans adopted by the court below were to prevail.

4. That court's approach to the interpretation of language in employee benefit plans would narrow plan administrators' scope of choice among alternate reasonable interpretations of plans; it would increase the number of benefit plan interpretation cases occupying judicial time, and it would increase uncertainty regarding participants' entitlement to benefits and employee benefit plan liabilities.

5. The greater uncertainty regarding the liabilities of employee benefit plans may impel sponsors to revise

their benefit plans to explicitly provide for each forseeable contingency. These revisions would involve considerable cost (which could better be spent for benefits), and would result in increasing the length and complexity of plan provisions thereby making it much more difficult to comply with the mandate of the Employee Retirement Income Security Act of 1974 (ERISA) to describe plans "in a manner calculated to be understood by the average plan participant". 29 U.S.C. § 1022(a)(1).

6. The greater uncertainty regarding the liabilities of employee benefit plans would also add to the complexity and difficulty of buying or selling a going business with employee benefit plans intact.

7. The lower court's approach also jeopardizes the integrity of the federal legislative process. Although Congress specified the sanctions that should be applied for noncompliance with the reporting and disclosure provisions of ERISA, the court below in effect created a new sanction for such noncompliance: liability for benefits which would not otherwise be available under the benefit plan.

WHEREFORE, ORC respectfully requests leave of the Court to file its brief as amicus curiae.

Respectfully submitted,

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BRIEF OF ORGANIZATION RESOURCES COUNSELORS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

The interest of Organization Resources Counselors, Inc. (ORC) as amicus curiae is set forth in the motion for leave to file that accompanies this brief.

SUMMARY OF ARGUMENT

Under the Employee Retirement Income Security Act of 1974 (ERISA), the plan administrator's interpretation of "an employee benefit plan will not be reversed by the courts unless it is arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 959 (1985). A plan administrator's interpretation does not become arbitrary and capricious by reason of its noncompliance with the reporting and disclosure provisions of ERISA.

Congress has provided specific sanctions for noncompliance with the reporting and disclosure provisions of ERISA. The courts may not create additional sanctions. Even if there were some circumstances warranting a remedy beyond those specified in the Act, the remedy fashioned by the court below is not appropriate because it undercuts important national policies.

Furthermore, an early resolution of the issues is necessary to carry out the strongly expressed Congressional policy in favor of uniform national rules to govern employee benefit plans.

ARGUMENT

The court below held that noncompliance with the reporting and disclosure provisions of ERISA gives rise to a participant cause of action for severance benefits. The court so held even though the plaintiffs who had worked for Granny Goose Foods, Inc. (Granny Goose) continued without interruption to work for Granny Goose at their same jobs at the same rates of pay. The court so held even though there was no showing of any causal relationship between noncompliance with ERISA and the plan administrator's interpretation that plaintiffs were not entitled to benefits. The court so held even though

Congress specified with particularity the sanctions for noncompliance, and further specified with particularity who has standing to seek particular remedies. Employee benefit plans are designed to ameliorate certain economic risks faced by participants in those plans.[1] Forcing an employee benefit plan to pay out "windfall" benefits runs counter to that underlying principle.

A. The Petition Should Be Granted Because the Case at Bar Raises Critical Questions Affecting the Administration of Over 2.3 Million Employee Benefit Plans

The case at bar raises critical questions affecting the day-to-day administration of over 1.6 million employee welfare benefit plans covering over 140 million participants and beneficiaries and about 788,000 employee pension benefit plans covering about 64.5 million participants and beneficiaries.[2] At issue is whether the established respective roles of plan administrators and the courts in interpreting employee benefit plans should be modified or exceptions allowed. ORC estimates that, on the average, over six decisions per plan per year are subject to participant requests for a second review within the structure of the plan. Given the approximately 2.388 million employee benefit plans, that means that over 14 million plan administrators' decisions are subjected to a second review within the plan each year upon the request of the participant after the initial decision of the plan administrator. The number of initial decisions made by plan administrators is unknown, but it is many times the number of cases invoking plan review procedures. It is sound policy, therefore, and it is the policy underlying the prevailing law, for courts to defer

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[1] "The purpose of severance pay is to provide a cushion for terminated employees while they are seeking new employment." 1 Pol'y & Prac. Ser., Compensation (BNA) § 331 at 731.

[2] These estimates were obtained from the U.S. Department of Labor.

to plan administrators in the absence of a showing that a decision is arbitrary and capricious. Any other policy would lead to an unmanageable number of reviews by courts.

In the case at bar the interpretative question was whether an employee of Granny Goose is entitled to "severance" pay benefits when he or she continues to work for Granny Goose at the same job at the same rate of pay although Granny Goose is no longer within the Del Monte corporate structure. Del Monte has sold a number of subsidiary corporations, both before and since the initiation of this action, in transactions similar to the sale of Granny Goose. In none of these transactions have severance pay benefits been paid.[3] The plan's meaning, as elucidated by the way it was applied in all these transactions, clearly shows that benefits are payable only upon actual job loss resulting in economic harm.

Moreover, it is settled doctrine that where an employee benefit plan admits of two or more reasonable interpretations, the interpretation of the plan administrator should prevail. Even if one were reluctant to acknowledge the clarity of the Del Monte plan's meaning from its consistent application over a significant period of time, the job loss interpretation of the plan administrator is clearly a reasonable one in the context of this plan. Thus, its interpretation should prevail.

In the case at bar, however, the court below refused to consider the cogent, consistent practice of the plan administrator because the plan was not in compliance

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[3] ORC has made a sample survey of 22 of the largest companies in the nation which indicates (1) that all of those surveyed have severance pay plans, (2) that none of those plans pay severance benefits upon the sale of a subsidiary or business unit without job loss or significant economic harm to employees, and (3) that, until the case at bar, most of them did not have language in their plans specifically excluding coverage where the sale of a subsidiary or unit does not result in job loss or significant economic harm to employees.

with the reporting and disclosure provisions of ERISA. The fact that plaintiffs had actual knowledge of the existence of the plan made no difference to the court below. Having put aside the past consistent application of the plan as an aid in interpreting the plan, the court below turned to the language of the plan and found that the plan administrator's interpretation was "not required" by its language. *Blau v. Del Monte Corporation*, 748 F.2d 1348, 1354 (9th Cir. 1984).

Del Monte was not required to have a severance pay plan and, if it chose to have one, it was free to condition its severance pay policy so as to exclude such benefits where a subsidiary is sold as a unit and there has been no job loss. The question in the court below was whether reading the plan this way was a fair and reasonable interpretation of the plan language.[4] The Court of Appeals said that such a construction of the plan was beyond the range of reasonable discretion of the plan administrator. That conclusion was a gross abuse of judicial authority. But that is not all. The Court of Appeals also said that the standard approach of looking to past practice for elucidation of language was not permissible in this case because of unrelated procedural requirements of ERISA.[5]

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[4] In connection with a similar sale of a business unit and a similar interpretation of a similar severance pay policy, a recent court found that the employer "reached a logical conclusion when it determined that severance pay benefits for laid off employees were intended for employees who suffered at least some period of unemployment . . . [and] avoids the obvious windfall that the employees would otherwise receive." *Pabst Brewing Company v. Anger*, Civ. No. 3-84-461, slip op. (D.C. Minn. June 6, 1985).

[5] In *Gilbert v. Burlington Industries*, Nos. 84-7824, 84-7908, 84-7914, slip op. (2d Cir. June 17, 1985), the court appears to approve the approach of holding an otherwise reasonable interpretation of a benefit plan to be arbitrary because of violation of procedural requirements. The court relied upon the erroneous proposition that "ordinarily there is no remedy for the violation for [sic]

Congress did not intend denial of that time-honored aid to be a remedy for violation of ERISA's reporting and disclosure provisions.[6]

B. The Petition Should Be Granted Because It Raises Fundamental Questions Regarding The Propriety of Judicial Creation of a Remedy Where Congress Has Already Specified the Penalty for Noncompliance

Integrity of the legislative process is a matter of vital concern. Many compromises were struck in the course of the lengthy legislative process that led to the enactment of ERISA. Though the courts play a critical role in resolving certain issues arising under ERISA, it is no oversight that the Act does not authorize them to fashion whatever remedies they deem desirable for noncompliance with the procedural requirements. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979).

Congress carefully crafted ERISA during that long legislative process leading to its enactment. Many

---

procedural requirements." *Id.* Civil remedies for violation of reporting and disclosure procedural requirements are discussed at p. 7, *infra*. The statutory provisions authorizing civil remedies for violation of procedural requirements and imposing criminal penalties for such violations are set out in the Appendix.

[6] The consequences could be far reaching. Creating an ill-defined class of cases in which reference to past practice is forbidden would introduce another discordant note into the realm of labor relations and would only increase tension and litigation. The administration of Title IV of ERISA by the Pension Benefit Guaranty Corporation (PBGC) might also be impacted. PBGC looks to past practice for guidance regarding the proper interpretation of plan language. If the Ninth Circuit's approach in *Blau* were to prevail, PBGC might be required to inquire whether there have been reporting and disclosure violations and to decide whether the noncompliance were sufficiently serious that PBGC could not look to the past practice of the plan for guidance in interpreting its provisions.

changes were made during its consideration by four committees of the Congress, during its consideration on the floor of the Senate and then in the House. Finally, it was rewritten in substantial part in the Conference Committee.

This Court is familiar with the crafting of ERISA remedies. Only a few weeks ago, this Court said "We are reluctant to 'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Company v. Russell*, 53 U.S.L.W. 4938, 4942 (U.S. June 27, 1985). And even more apropos to the case at bar, this Court observed that the "carefully-integrated civil enforcement provisions found in . . . the statute [ERISA] as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies . . ." *Id.* (emphasis in original).

ERISA requires reporting of information to the Secretary of Labor and disclosure of certain information to participants, sometimes upon request. Congress specified sanctions for non-compliance with ERISA,[7] and who had standing to enforce those sanctions. The statutory remedies for noncompliance with the reporting and disclosure provisions of ERISA are set out in the Appendix to this brief.

ERISA authorizes either a participant or the Secretary of Labor to bring a civil action "to enjoin any act or practice which violates any provision" or to "obtain other appropriate equitable relief." 29 U.S.C. § 1132 (a)(5). Respondents could have brought an action to redress the noncompliance with the reporting and dis-

---

[7] For example, Congress provided for criminal penalties for certain violations of reporting and disclosure provisions, but did not provide for any specific criminal penalties for the violation of prohibited transactions or other breaches of fiduciary obligations under ERISA. 29 U.S.C. § 1131.

closure requirements of ERISA. Instead they chose to bring the present action for benefits.[8]

Benefits of an employee benefit plan are payable from the plan, not from the plan sponsor.[9] ERISA specifically makes the plan subject to being sued as a separate entity. 29 U.S.C. § 1132(d)(1). "ERISA permits suits to recover benefits only against the Plan as an entity . . ." *Gelardi v. Pertec Computer Corporation*, 761 F.2d 1323, 1324 (9th Cir. 1985). In the instant case, the plan was unfunded, i.e., benefits were paid out of the general funds of the employer-sponsor. Most employee benefit plans, however, have funds of their own. It would not be a proper expenditure of these funds for a plan to pay for an employer-sponsor's non-compliance with ERISA. If the decision below stands, it could add confusion to an already complex area of law and could possibly be the basis for improper court orders against plans for the wrongs of others.

Although the erroneous award of severance benefits in a single case would not warrant the attention of this Court, severance benefit plans are prevalent across the nation. More importantly, the same erroneous reasoning of the court below would apply to other employee benefit plans. It is thus critical that this Court hear this case and resolve this important issue.

---

[8] The counts in the complaint in the case at bar for damages were claims under state common law preempted by ERISA; therefore they were dismissed. *Blau v. Del Monte Corporation*, 748 F.2d at 1356-7.

[9] This point was not raised below, probably because in this case benefits were payable from the general funds of the employer. It made no practical difference, therefore, whether the order ran against the plan or against the employer-sponsor. In the context of employee benefit plans generally, this is a rare case in that respect.

C. The Petition Should be Granted Because the Conflict Among the Circuit Courts of Appeal is Jeopardizing the Congressional Policy that Employee Benefit Plan Law Should be Uniform Across the Nation

The existence of a conflict among the Circuit Courts of Appeal has been discussed in the Petition for Certiorari, and will not be repeated here. Congress made it clear that uniform national rules regarding employee benefit plans are of vital importance. The enactment of standards in ERISA demonstrates the Congressional view that nationwide rules were needed. But Congress did not stop there. Congress was so concerned about the uniformity of the legal rules governing employee benefit plans that it ousted state law with preemption language [10] that this Court has described as a "virtually unique preemption provision." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 at n.26 (1983).

Lack of national uniformity regarding the application of ERISA causes multi-state employers severe hardship. It also makes administration of employee benefit programs more difficult and expensive by creating uncertainty in benefit plan decisions, and it can lead to employee discontent. The decision below would result in totally unexpected liabilities for the employee benefit plan and a windfall for the employees involved. To the extent that costs of employee benefit plans become less predictable, employers will be more reluctant to establish and maintain them. Unlike the plan in the case at bar, the overwhelming majority of employee benefit plans are funded, and reasonable forseeability of liabilities is essential to their actuarial soundness. Lack of uniformity of rules and lack of reasonable predictability of costs

---

[10] "This provision has been aptly termed the most sweeping federal preemption statute ever enacted by Congress." *California Hospital Association v. Henning*, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983).

inhibits the expansion of employee benefit plans and detracts from their fair and efficient administration. Thus, early resolution of the issues at hand is as important as the merits of the resolution.

CONCLUSION

For the reasons set forth above, amicus curiae respectfully submits that the issues raised by the decision below are of substantial significance warranting this Court's review, and therefore the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 26, 1985

APPENDIX

REMEDIES FOR VIOLATION OF THE REPORTING AND DISCLOSURE REQUIREMENTS OF ERISA

18 U.S.C. § 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.

> Whoever, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

26 U.S.C. § 6652. Failure to file certain information returns, registration statements, etc.

> (e) Annual registration and other notification by pension plan.—
>
> (1) Registration.—In the case of any failure to file a registration statement required under section 6057(a) (relating to annual registration of certain plans) which includes all participants required to be included in such statement, on the date prescribed therefor (determined without regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file,

an amount equal to $1 for each participant with respect to whom there is a failure to file, multiplied by the number of days during which such failure continues, but the total amount imposed under this paragraph on any person for any failure to file with respect to any plan year shall not exceed $5,000.

(2) Notification of change of status.—In the case of failure to file a notification required under section 6057(b) (relating to notification of change of status) on the date prescribed therefor (determined without regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, $1 for each day during which such failure continues, but the total amounts imposed under this paragraph on any person for failure to file any notification shall not exceed $1,000.

(f) Information required in connection with certain plans of deferred compensation.—

In the case of failure to file a return or statement required under section 6058 (relating to information required in connection with certain plans of deferred compensation), 6047 (relating to information relating to certain trusts and annuity and bond purchase plans), or 6039D (relating to returns and records with respect to certain fringe benefit plans) on the date and in the manner prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, $25 for each day during which such failure continues, but the total amount imposed under this subsection on any person for failure to file any return shall not exceed $15,000.

29 U.S.C. § 1025. Reporting of participant's benefit rights.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement.

Each administrator required to register under section 6057 of Title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a) (2) (C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a) (2) of Title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

29 U.S.C. § 1131. Criminal Penalties.

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

29 U.S.C. § 1132. Civil enforcement.

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section,

* * * *

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

* * * * *

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(A)

Supreme Court, U.S.
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No. 84-2009

In the Supreme Court

OF THE

United States

October Term, 1985

DEL MONTE CORPORATION, a New York corporation, R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation, DEL MONTE SNACKS, INC., a California corporation, Petitioners,

vs.

BARBARA BLAU, RAM BLAU, ANN MAYO and RICHARD LINDGREN, individually and on behalf of all other former employees of DEL MONTE SNACKS, INC., similarly situated, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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EDITOR'S NOTE

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF

A. INTRODUCTION

Respondents Barbara Blau, Ram Blau, Ann Mayo and Richard Lindgren, individually and on behalf of all other former

employees of Del Monte Snacks, Inc., similarly situated, hereby oppose the motion of Organization Resources Counselors, Inc. for leave to file an amicus curiae brief in support of the petition for a writ of certiorari filed herein. Respondents base their opposition on the ground that counsel for said amicus curiae, Epstein Becker Borsody and Green ("Epstein, Becker"), suffers from a basic and irremediable conflict of interest with respect to respondents and, accordingly, is disqualified from representing any party whose interests are materially adverse to respondents. The factual and legal bases for this opposition are set forth in the following affidavit and legal argument.

B. AFFIDAVIT OF DAVID W. BAER

STATE OF CALIFORNIA)
)
CITY AND COUNTY OF SAN FRANCISCO)

I, David W. Baer, being duly sworn, certify:

1. I am an attorney in the law firm of Hanson, Bridgett, Marcus & Vlahos, counsel for respondents herein. I have had responsibility with respect to this matter since June of 1982. If called as a witness, I would be competent to testify to all of the matters stated herein.

2. In May of 1985, six former attorneys of this firm, Ross E. Stromberg, Gerald M. Hinkley, Diane W. Carter, Thomas C. Geiser, Mark T. Schieble and Dena R. Belinkoff joined the San Francisco office of Epstein, Becker, counsel for proposed amicus curiae Organization Resources Counselors, Inc. Four of these attorneys, Mssrs. Stromberg, Hinkley, and Geiser and Ms. Carter, were partners in this firm and, to the best of my knowledge, are now partners in the Epstein, Becker firm. Mr. Stromberg was a named partner in this firm and is now

a named partner in Epstein, Becker's San Francisco office.

3. Respondents' initial consultation with their present counsel occurred on April 16, 1981. Commencing one week later, and until May of 1983, Mr. Geiser performed substantial legal services for respondents in this matter including, but not limited to, attending client meetings, one of which was conducted on a class-wide basis, participating in telephone conferences with the clients, corresponding with the clients, obtaining and reviewing documents provided by the clients and participating in strategy meetings regarding the potential theories of liability (particularly with respect to ERISA) and the preparation of the complaint. Mr. Geiser played a central role in the development of this case on behalf of respondents, his principal function being to investigate and develop the background facts in order to determine and analyze the possible causes of action to be asserted against petitioners. In this process, Mr. Geiser acquired material confidential information from respondents and became thoroughly

familiar with the relevant facts in this case.1/

4. In view of Mr. Geiser's involvement in the formative stages of this case, I continued to advise him of developments as they occurred, including strategic considerations, legal themes presented and pertinent confidential information which had been revealed to me by the clients.

5. Mr. Geiser was thoroughly familiar with a majority of the documents placed in this office's files for this case prior to the filing of the complaint and, specifically, had reviewed virtually all of the documents obtained from the clients prior to that time. In addition, the other five attorneys, who are now members of the Epstein, Becker firm, had free access to the files at all times while working at this firm.

6. I have spoken to the class representatives, Barbara Blau, Ram Blau,

---

1/ This office maintains billing records in the normal course of business showing Mr. Geiser's activity in the case, which records can be produced for the Court upon request.

Ann Mayo and Richard Lindgren regarding this matter. They requested me to inform the Court that they do not consent to the representation of Organization Resources Counselors, Inc. by Epstein, Becker, or any of its attorneys, for the purpose of asserting an interest which is materially adverse to respondents. Specifically, they do not consent to the filing or consideration of the amicus curiae brief, prepared and submitted by Epstein, Becker.

7. On July 18, 1985 I became cognizant of the conflict of interest described above and immediately telephoned amicus curiae's counsel of record, Henry Rose, to inform him of the same. He was out of the office and I asked that he be given a message stating our position that Epstein, Becker was disqualified due to Mr. Geiser's prior involvement in the case. On July 19, 1985 I spoke with Mr. Rose over the telephone and requested that he refrain from filing the proposed amicas curiae brief. Mr. Rose told me that the brief had already been filed earlier that day so I asked him to voluntarily withdraw instant motion. Mr. Rose indicated that

he would not do so and I therefore told him that this office intended to oppose the motion.

Dated: August 8, 1985

DAVID W. BAER

Subscribed and sworn to before me this 8th day of August, 1985.

Notary Public in and for the City and County of San Francisco, State of California

C. **LEGAL ARGUMENT**

No lengthy discussion of the legal principles requiring disqualification of amicus curiae's counsel is necessary. Rule 1.10 of the American Bar Association Model Rules of Professional Conduct sets forth the circumstances in which a firm is disqualified when it has associated a lawyer from another firm. Specifically, Rule 1.10(b) provides:

> "When a Lawyer becomes associated with a firm.[2/] the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information

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2/ With respect to the definition of a firm, the ABA Comment to Rule 1.10 indicates that where two or more attorneys ". . . present themselves to the public in a way suggesting they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules." ABA/BNA Lawyer's Manual on Professional Conduct at 01:125 (1984). Thus, although Epstein, Becker may have various offices, including those located in San Francisco and Washington, D.C., it should still be regarded as a single firm.

> protected by Rules 1.6 and 1.9(b) that is material to the matter."

In general, information protected by Rules 1.6 and 1.9(b) is that which "relate[s] to the representation," other than that information which the client has expressly or impliedly authorized to be revealed.

As a means of balancing the competing interests of the former client (preserving confidentiality and loyalty), the present client (having a reasonable choice of legal counsel) and attorneys (maintaining freedom to change employment), Rule 1.10(b) does not establish a per se standard for disqualification based on an attorney's prior association with a firm which represents a client against whom that attorney's present firm asserts an adverse interest. Rather, the rule requires a factual inquiry -- did the lawyer involved have actual knowledge of confidential information material to the matter? See, ABA/BNA Lawyer's Manual for Professional Conduct, pp. 01:126-127 (1984). Even under this relaxed

standard,[3] it is evident that Organization Resources Counselors, Inc.'s counsel is disqualified.

3/ The majority of the circuits to address the issue have adopted a far more stringent test, and hold that if "a substantial relation" exists between the pending suit and the matter in which the attorney previously represented the client, there is a conclusive presumption that an attorney who represented the client in the former matter has learned facts that require his disqualification. See, e.g., In re Currugated Container Antitrust Litigation, 659 F.2d 1341, 1347 (5th Cir. 1981); Trone v. Smith, 62 F.2d 994, 998-999 (9th Cir. 1980); Arkansas v. Dean Foods Products Co., 605 F.2d 380, 384 (8th Cir. 1984) overruled on appealability issue, In re Multi-piece Rim Products Liability Litigation, 612 F.2d 377, 378 (8th Cir. 1980) vacated sub nom. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 754 (2d Cir. 1975) overruled on appealability issue, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980); c.f. Kevlik v. Goldstein, 724 F.2d 844, 851 (1st Cir. 1984). Here, the matters are not merely "substantially related"; rather, the conflict arises out of the very same case. C.f. Hull v. Celanese Corporation, 513 F.2d 568 (2d Cir. 1975).

As the preceding Affidavit of David W. Baer establishes, Mr. Geiser, formerly a member of the Hanson firm which represents respondents, and now a member of the Epstein, Becker firm representing amicus curiae, does have actual knowledge of confidential information which is material to respondents' representation in this matter. Indeed, Mr. Geiser not only had access to confidential information, but directly communicated with the clients face-to-face, over the telephone and through the mails, and was even responsible for obtaining and analyzing the basic facts and documents supporting respondents' cause of action against petitioners.

It is equally plain that the interests of Organization Resources Counselors, Inc. are materially adverse to respondents' interests. The amicus curiae brief supports the same petition for a writ of certiorari which respondents oppose and, not surprisingly, the legal arguments raised in the amicus curiae brief are directly contrary to those made by respondents in their brief. Accordingly, the result of

applying Model Rule 1.10(b) to the facts of this case are clear: Epstein, Becker should be disqualified and amicus' motion for leave to file the amicus curiae brief prepared by that firm should, therefore, be denied.

Respondents do not mean to suggest that Mr. Geiser (or any of the other five former members of the firm representing respondents) has in fact violated his professional responsibility to preserve respondents' confidences. Nonetheless, Mr. Geiser's fiduciary responsibility to respondents while a member of this firm is unquestionably in conflict with his, and his firm's, present fiduciary responsibilities to their current client. As the Ninth Circuit aptly observed:

> "[d]isqualification does not depend upon proof of the abuse of confidential information. Because of the sensitivity of client confidence and the profession's institutional need to avoid even the appearance of a breach of confidence, disqualification is required when lawyers change sides in factually related cases." Trone v. Smith, 621 F.2d 994, 1001 (9th Cir. 1980).

Consequently, if the attorney is disqualified, ". . . the firm as a whole is disqualified whether or not its members were actually exposed to the information." Id. at 999.

Rule 1.10(b) is consistent with this principle and does not permit any exception to disqualification based on a showing that the attorney did not reveal confidential information to his or her new associates. Any such exception, particularly in the context of the same litigation out of which the conflict arises, would merely invite abuse and, as importantly, because of the appearance of impropriety, would foster distrust of the profession.

D. CONCLUSION

For the foregoing reasons respondents respectfully submit that Organization Resources Counselors, Inc.'s motion for leave to file an amicus curiae brief should be denied.

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Counsel for Respondents

No. 84-2009

Supreme Court, U.S.
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Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondents admit that, under the Ninth Circuit's holding, noncompliance with ERISA's reporting and disclosure provisions "is probative of and, in fact, may *in itself* be sufficient to establish arbitrary and capricious conduct" (Respondents' Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opp."), p. 8) (emphasis added). Hence, contrary to this Court's recent decision in *Massachusetts Mutual Life Insurance Co. v. Russell* (June 27, 1985) 53 U.S.Law Week 4938, ____ U.S. ____, the court below has created a "remedy" not set forth in ERISA, under which an employee may recover "benefits" based solely upon alleged procedural violations unrelated to a plan administrator's reasonable decision to deny benefits. That unprecedented holding, and the Ninth Circuit's novel limitations upon an employer's

discretion in interpreting an ERISA plan, require review by this Court.

ARGUMENT

I

THE NINTH CIRCUIT'S OPINION WOULD PERMIT RECOVERY OF BENEFITS BASED UPON REPORTING AND DISCLOSURE VIOLATIONS UNRELATED TO THOSE BENEFITS.

A. Under the Ninth Circuit's opinion, a violation of ERISA's procedural provisions "may in itself be sufficient to establish arbitrary and capricious conduct."

Respondents make inordinate efforts to characterize the dispute here as simply one about the unique terms of a particular plan (see Opp., pp. 2-3, 10, 11-13, 18-22, 24.) Despite respondents' attempts to downplay the importance of the issues presented, they themselves admit that the "essence" of the Ninth Circuit's ruling is that noncompliance with ERISA's reporting and disclosure provisions "is probative of and, in fact, *may in itself be sufficient to establish arbitrary and capricious conduct*" (Opp., p. 8) (emphasis added). This is a rule of per se liability: if the administrator's noncompliance is sufficiently "flagrant," then the administrator's denial of benefits may be arbitrary and capricious "as a matter of law" regardless of whether the denial of benefits was causally related to the noncompliance (see Appx., pp. A26-A29, A35). That ruling is contrary to previously decided cases, which hold that procedural violations of ERISA may be the basis of a cause of action *if* they cause economic injury through the loss of benefits which otherwise would have been granted (see Petition for Writ of Certiorari (hereinafter "Pet."), p. 7).[1]

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[1] Respondents assert that "numerous cases" have found "arbitrary and capricious" conduct "due to a procedural violation" (Opp., p. 22). The cases cited by respondents (Opp., p. 22, fn. 22; and see id., p. 17, fn. 18) are instructive. One of those cases (*Wolfe v. J.C. Penney Co., Inc.* (7 Cir. 1983) 710 F.2d 388) stressed that the employee was "*not*

Equally important, the ruling below is contrary to this Court's recent decision in *Massachusetts Mutual Life Insurance Co. v. Russell* (June 27, 1985) 53 U.S.Law Week 4938, ____ U.S. ____. In *Russell,* the Court noted Congress' careful delineation of remedies within ERISA and the absence of any provision for extra-contractual damages, declaring, "[w]e are reluctant to 'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA" (53 U.S.Law Week 4942). This Court held that a claim for extra-contractual—but actual—damages could not be maintained. A fortiori, in this case, the Ninth Circuit's creation of a right to recover "benefits" absent causation and actual economic loss must also be rejected.[2]

The Ninth Circuit's ruling has already led to further conflict between the circuits. The Second Circuit recently considered a claim for severance benefits where there had been noncompliance with ERISA's disclosure and reporting provisions (*Gilbert v.*

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entitled to a substantive remedy * * * based upon [the administrator's] procedure violation" (710 F.2d 393) (emphasis added), citing *Grossmuller v. International Union, U.A.W.* (E.D.Pa. 1981) 511 F.Supp. 709, which held that "[a] substantive remedy * * * would be possible only if plaintiff could show that the procedural defects caused the substantive violation" (511 F.Supp. 711). In four of the cases, it was held that an employee *who suffers an economic harm* due to a procedural violation is entitled to a substantive remedy (*Gors v. Venoy Palmer Market, Inc.* (E.D.Mich., S.D. 1984) 578 F.Supp. 365, 368-369; *Hillis v. Waukesha Title Co., Inc.* (E.D.Wis. 1983) 576 F.Supp. 1103, 1109; *Grossmuller v. Budd Co. Consol Retirement, Etc.* (E.D.Pa. 1982) 547 F.Supp. 111, 115-116; *Toland v. McCarthy* (D.Mass. 1980) 499 F.Supp. 1183, 1194-1195). And in one, although the court concluded that the plan trustees were obligated to provide a written rationale for their decision, it did not even suggest that a cause of action *for damages* would lie for failure to do so (*Richardson v. Cent. States, Southeast & Southwest* (8 Cir. 1981) 645 F.2d 660, 664-665).

[2] The concurring opinion in *Russell* was of the view that extra-contractual damages might be available in some cases if an appropriate analogy to state trust law could be found (53 U.S.Law Week 4945). We are aware of no principle of state trust law which would convert procedural noncompliance into a "substantive" wrong, absent an actual economic loss flowing from the noncompliance.

Burlington Industries, Inc. (2 Cir. 1985) 765 F.2d 320). Stating that it would "adopt" the "approach" of the Ninth Circuit, that court held:

> "The question of whether [the employer's] violations of ERISA's requirements sufficiently taint its denial of severance pay so as to warrant a finding that it was arbitrary and capricious is not before us. That determination is left to the judgment of the district court" (765 F.2d 329).

Thus, the Second Circuit, like the Ninth Circuit, has departed from precedent and determined that procedural violations alone may "taint" an interpretation of a plan and "warrant" an award of "benefits."[3]

B. The decision to deny benefits was fully within the scope of the plan, and respondents suffered no injury.

Respondents seek to bolster the Ninth Circuit's ruling with three other, equally erroneous, arguments: (1) that, "under the express terms of the plan, respondents *are* entitled to benefits," (2) that, "in fact, * * * respondents were harmed," and (3) that the petition "ignores" the "gross nature" of Del Monte's procedural violations of ERISA (Opp., p. 11) (emphasis in original). We respond seriatim:

1. The Del Monte plan's definition of eligibility provides that severance benefits are payable to "employees whose *positions are eliminated as a result of * * * elimination of operations to which*

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[3] In addition to claiming that procedural violations entitle them to "benefits" per se, respondents also cite a few purported instances of "arbitrary and capricious" conduct in the interpretation of the plan. Notably, neither the district court nor the Ninth Circuit agreed with these claims, no doubt because they are without foundation. For example, respondents place great emphasis upon testimony by a plan administrator to the effect that he had not read the written plan prior to acting (see Opp., pp. 8, 14, fn. 15, 16, fn. 17, 23). Respondents fail to advise the Court that he also testified (1) that, prior to acting, he consulted with legal and industrial personnel (ER, pp. 339-340), who *were* fully conversant with the written plan (ER, pp. 121, 124), and (2) that the written plan itself reflected "a long existing policy" which was applied in this case (ER, p. 165).

they have been assigned" (ER, p. 238) (emphasis added). Respondents acknowledge that their interpretation argument hinges on "the key conjunctive phrase" (Opp., p. 20) which, after the definition of eligibility, continues: "*and* for whom appropriate alternative employment opportunities are unavailable within the Corporation" (ER, p. 238) (emphasis added). That phrase clearly states an *additional condition* for qualification for benefits, which condition on its face is dependent upon elimination of employees' positions. If that *first* condition of eligibility is not met (i.e., the positions are not eliminated), then one does not reach the question of the occurrence of the *second* condition (i.e., the unavailability of other positions within the corporation).[4]

Thus, the prepositional phrase "within the Corporation" modifies the condition stated in respondents' "key" conjunctive phrase (i.e., the unavailability of alternative employment), not the preceding condition of eligibility (i.e., position elimination)—which condition notably contains no such modifier.

2. Respondents emphasize the Ninth Circuit's reference to the occurrence of "substantive harm" (Opp., pp. 9, 16) but, like the Ninth Circuit, they are unable to explain what that "harm" is. Obviously, any claim that respondents "suffered harm" by not receiving severance benefits (see Opp., p. 9) would be bootstrapping; the denial of benefits resulted from interpretation of the plan, not noncompliance with reporting or disclosure provisions of ERISA. And respondents do not appear to advance such an argument seriously.

Rather, respondents' major argument on this point is a variant of estoppel. Claiming that they had "knowledge of Del Monte's uniform practice," respondents assert that they were "misled into believing" that they would receive severance benefits and were thereby induced to remain at Granny Goose "rather than seek other employment" (see Opp., pp. 15, 16, 7). This argument fails both factually and legally. Respondents knew that other subsidiaries had been sold as ongoing businesses, and respondents did not know of a single employee who received severance benefits in

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[4] The same is true of the other "exclusions" and "exceptions" mentioned by respondents (see Opp., pp. 6, 12).

such cases (ER, pp. 136, 229, 448, 469, 610, 611). Moreover, there is not one iota of evidence that respondents declined other employment, let alone that such employment would have been on more favorable terms. Thus, respondents failed to show either reliance or detriment, and they therefore can claim no injury. "Since evidence of such reliance would be within their control, their failure to assert it, if indeed it exists, is fatal. In the absence of detrimental reliance, there is no reason to estop the defendants from denying coverage" (*Petrella v. NL Industries, Inc.* (D.N.J. 1982) 529 F. Supp. 1357, 1371).[5]

3. Respondents do not, and cannot, explain how their claim of "gross violations" of ERISA supports the decision below. There simply is no evidence that any noncompliance with ERISA was related to, or brought about, the interpretation complained of here. Respondents', and the Ninth Circuit's, colorful rhetoric is no substitute for reasoned legal analysis.

II

THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE *SLY* AND *ANDERSON* DECISIONS.

Try as they may, respondents cannot distinguish the decision in *Sly v. P. R. Mallory Co., Inc.* (7 Cir. 1983) 712 F.2d 1209. They admit that the severance plan in *Sly* was dependent upon "position elimination" (Opp., p. 20), and, as discussed in the Petition (at p. 11) and immediately above, the Del Monte plan is similarly dependent upon position elimination *generally*; it does *not* depend (as respondents would have it) upon a "loss of position at *Del Monte*" (Opp., p. 21) (emphasis by respondents). Hence, the

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[5] Nor is there any basis for the suggestion that failure to recognize respondents' novel claims would somehow "deny" employees a remedy for an employer's noncompliance with ERISA's reporting and disclosure provisions or would somehow "reward" such noncompliance (see Opp., p. 2-3, 10, 25; and see Appx., p. A32). As discussed above, Congress carefully set forth in ERISA the remedies available to employees. Those remedies include injunctive relief to force compliance (29 U.S.C. § 1132 (a)(5)), as well as other civil and criminal penalties for ERISA violations (see 18 U.S.C. § 1027; 29 U.S.C. §§ 1131, 1132).

holding of the Seventh Circuit applies here; namely, that it was entirely reasonable—and not arbitrary and capricious—to conclude that, although positions were eliminated with the employer, "in fact the work force remained intact and the positions remained available to the employees" (712 F.2d 1211). Thus, severance plans which contain indistinguishable pertinent language face differing results in the Seventh and Ninth Circuits.

Respondents miss the point of petitioners' discussion (at Pet., pp. 7-8) of *Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1518 (see Opp., pp. 19-20). In *Anderson*, in a context similar to the instant case, the Eleventh Circuit soundly rejected a claim that procedural violations rendered the arbitrary and capricious test inapplicable, and it applied that test in a manner consistent with prior decisions (759 F.2d 1521-1523). In contrast, the Ninth Circuit, while purporting to act within the arbitrary and capricious test, created the novel rule that procedural violations may render plan interpretations arbitrary and capricious per se. That conflict is irreconcilable, and requires resolution by this Court.

III

THE NINTH CIRCUIT'S APPLICATION OF THE ARBITRARY AND CAPRICIOUS TEST IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

In attempting to defend the Ninth Circuit's application of the arbitrary and capricious test, respondents contend, first, that the Ninth Circuit really meant to say only that conditions contrary to a plan's language may not be imposed and, second, that, in any event, what the Ninth Circuit actually did say was correct (see Opp., pp. 21-25). Respondents are wrong on both counts.

The Ninth Circuit was clear in its ruling that a plan administrator's interpretation is arbitrary and capricious when it "impose[s] * * * standards not required by the severance policy" (Appx., p. A29). If an administrator *may not* impose "standards" which are "not required" by a plan, then it *must* apply only those "standards" which are required by that plan. This is no different than saying that an administrator's interpretation is impermissible, i.e.,

arbitrary and capricious, unless it is required by the language of the plan. In the context of a plan which admits of but *one* interpretation, such a broadly-stated rule would not cause an objectionable result. However, in the context of a plan which is subject to alternative reasonable constructions, such a rule is contrary to the law prevailing in the majority of the circuits (see Pet., pp. 10-12).

In this regard, respondents also assert that the rule stated by the Ninth Circuit is correct, relying upon an Eighth Circuit case and a few other cases which cite that Eighth Circuit case (see Opp., pp. 23-24). But, as respondents admit, the premise of those cases is that a condition of eligibility has been imposed "without any foundation in the language of the plan" (Opp., p. 24). This supposed rule simply can have no application when the "condition" in fact is a reasonable interpretation of the plan.[6]

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[6] For similar reasons, there is no relevance to the cases cited by respondents in support of their claim that Del Monte's consistent past practice is irrelevant (see Opp., p. 25, fn. 25). None involved the situation in which the past practice was in fact consistent with the language of the plan. Rather, those cases involved situations in which there was (1) an unreasonable interpretation of a plan (*Morgan v. Mullins* (8 Cir. 1981) 643 F.2d 1320, 1324), (2) a consistent past practice *contrary* to the language of the plan (*Petrella v. NL Industries*, Inc. (D.N.J. 1982) 529 F.Supp. 1357, 1362), (3) a condition imposed not within the language of the plan (*Palino v. Casey* (1 Cir. 1981) 664 F.2d 854, 859 (dictum); *Valle v. Joint Plumbing Industry Bd.* (2 Cir. 1980) 623 F.2d 196, 202-204), or (4) a forfeiture clause violated by an employee who was unaware of it (*Hillis v. Waukesha Title Co., Inc.* (E.D.Wis. 1983) 576 F.Supp. 1103, 1108-1110).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

Supreme Court, U.S.
FILED
AUG 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-2009

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DEL MONTE CORPORATION, A New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,

Petitioners,

vs.

BARBARA BLAU, RAM BLAU, ANN MAYO and RICHARD LINDGREN, individually and on behalf of all other former employees of DEL MONTE SNACKS, INC., similarly situated,

Respondents.

RESPONSE OF ORGANIZATION RESOURCES COUNSELORS, INC. TO RESPONDENTS' BRIEF IN OPPOSITION TO MOTION OF ORGANIZATION RESOURCES COUNSELORS INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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INTRODUCTION

In their brief in opposition to the motion of Organization Resources Counselors, Inc. ("ORC") for leave to file an

amicus curiae brief ("Resp. Opp. Br."), Respondents assert that Rule 1.10(b) of the American Bar Association Model Rules of Professional Conduct mandates disqualification of ORC's counsel in this matter. As we demonstrate herein, Respondents' contention is wholly lacking in merit. The harsh disqualification remedy of Rule 1.10(b) simply does not apply to the facts and circumstances here present and, in any event, cannot serve as the basis for barring a non-lawyer party from serving in the vital role of amicus curiae.

A. Statement of Facts

1. In May 1985, Thomas C. Geiser and six other lawyers previously associated with the law firm of Hanson, Bridgett, Marcus & Vlahos joined the San Francisco office of Epstein, Becker, Borsody & Green, P.C. ("EBB&G"). While associated with Hanson, Bridgett, Marcus & Vlahos, Mr. Geiser had been involved in the initial development of this case on behalf of the Respondents. Rose Affidavit ("Exhibit A") at ¶ 6.

2. Unbeknownst to Mr. Geiser, ORC, an existing EBB&G client, subsquently retained Henry Rose, a partner in EBB&G's Washington, D.C. office, to prepare an amicus curiae brief favoring the granting of certiorari in this case. Prior to this time, ORC had not been in any manner involved in this litigation.

3. Mr. Rose prepared and filed the amicus curiae brief and accompanying motion without consulting with Mr. Geiser or any other attorney at EBB&G. Rose Affidavit at ¶ 3. Only after ORC's motion and brief were filed and Respondents opposed same did Mr. Geiser's prior involvement in the case come to light. Rose Affidavit at ¶ 6.

4. Mr. Rose has shared no information concerning ORC's position with any other lawyer of EBB&G and has received no information, beyond that contained in their petition itself, from anyone purporting to have represented Respondents at any time. Rose Affidavit at ¶ 7.

B. Argument

Respondents contend that Rule 1.10(b),[1/] a rule designed to protect former clients from subsequent use of confidential disclosures by their previous attorney(s), serves to bar ORC from having its amicus curiae brief considered by the Court. This contention is unfounded. As Respondents acknowledge, Rule 1.10(b) does not establish a per se standard for attorney disqualification, but rather requires a balancing of the competing interests of the former client (preserving

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1/ Rule 1.10(b) of the American Bar Association Model Rules of Professional Conduct provides: "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."

confidentiality and loyalty), the present client (having a reasonable choice of legal counsel) and attorneys (maintaining freedom to change employment) in light of the pertinent facts. In the instant matter, application of this Rule 1.10(b) balancing test weighs heavily against the imposition of the disqualification remedy for the following reasons:

1. Henry Rose, the individual counsel who prepared ORC's amicus curiae brief, received no information regarding this matter from any other lawyer of EBB&G. See Rose Affidavit at ¶¶ 3 and 7. Moreover, Mr. Geiser, a former member of Respondents' firm, was not even aware that an attorney in EBB&G's Washington, D.C. office was preparing an amicus curiae brief for ORC in the instant case until after the brief was actually filed. See Rose Affidavit at ¶ 4. Thus, there was no possible abuse of confidential information by EBB&G in this matter.

2. ORC is not a party to the instant action, but instead is appearing as amicus curiae to offer the Court assis-

tance in determining whether the petition for certiorari should be granted. Thus, ORC was not a player in developing either the factual or legal issues in the case, nor did it participate in this matter in the district court or court of appeals. Moreover, as an amicus curiae, ORC must take the case as he finds it, and is not permitted to create, extend or enlarge issues beyond those raised and argued by the parties. Town of Chino Valley v. City of Prescott, 131 Ariz. 278, 638 P.2d 1324, appeal dismissed, 457 U.S. 1101 (1982), reh'g. denied 459 U.S. 899 (1982); Equi-lease Corp. v. United States Fidelity & Guar., 262 Ark. 689, 565 S.W.2d 125 (1978).

Therefore, as counsel to ORC, EBB&G is situated in a different position than that found in the traditional cases discussing attorney disqualification issues, including those decisions cited in Resp. Opp. Br. See, e.g., Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir. 1975). EBB&G does not represent a party, and is not developing

the factual and legal issues in this case. Accordingly, traditional concerns regarding the possible use of confidential information by a client's former attorney are not present here, as whatever information Mr. Geiser may possess is entirely irrelevant to the issue of whether the Court should grant a petition for certiorari in this case.

3. Furthermore, the instant matter is not fact-based and does not involve the strategic sensitivities which may have existed at the trial court level. The amicus curiae brief prepared by ORC's counsel addresses issues of statutory construction and the appropriateness of a court of appeals conclusion that a reasonable interpretation of an employee benefit plan by the plan administrator may be held to be arbitrary and capricious by reason of its noncompliance with the reporting and disclosure requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"). ORC's brief also

suggests that an early resolution of the issues raised by Petitioners is important to the day-to-day administration of over 2.3 million employee benefit plans. Thus, the alleged conflict-of-interest issue evaporates as the brief prepared by EBB&G for ORC bears absolutely no relationship to any facts of which Mr. Geiser may have become aware while an attorney at Respondents' law firm.

C. Conclusion

As recently reiterated by the Court of Appeals for the Seventh Circuit, the disqualification of an attorney is a "drastic measure which courts should hesitate to impose except when absolutely necessary." Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983) (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982)). The facts and circumstances discussed supra clearly do not warrant imposition of the drastic remedy of disqualification. Moreover, Rule 1.10(b) cannot serve to bar a non-lawyer party from serving in the

vital role as amicus curiae.

Accordingly, for the reasons set forth herein, ORC respectfully submits that Respondents' basis for opposition for leave to file an amicus curiae brief should be rejected.

Respectfully submitted,

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Counsel for Organization
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Amicus Curiae

Dated: August 30, 1985

Exhibit A

AFFIDAVIT OF HENRY ROSE

I, Henry Rose, being duly sworn, certify:

1. I am counsel of record to Organization Resources Counselors, Inc. (ORC) in the captioned case and a partner at the Washington, D. C. office of Epstein Becker Borsody & Green, P.C. (EBB&G).

2. On behalf of ORC, I filed a motion in this Court for leave to file a brief, amicus curiae, in support of the petition for certiorari in the captioned case. The motion was filed at about noon on July 26, 1985, together with the proposed brief.

3. I had responsibility for the preparation of the motion and brief. No other lawyer of EBB&G participated in the preparation of the motion or

brief. Nor were any of the points made in either the motion or brief discussed with any other lawyer of EBB&G prior to the filing.

4. In the afternoon of July 26, 1985, David W. Baer, Esquire, one of the attorneys for the respondents, informed me by telephone that Thomas C. Geiser, Esquire who had joined EBB&G in May, 1985, had worked on the captioned case prior to its litigation stage, while he was a member of Mr. Baer's law firm. Mr. Baer stated his opinion that in view of his information, I should not file my motion and brief. I informed him that they had been filed earlier in the day.

5. Mr. Baer erroneously states in his affidavit that the telephone conversation referred to in paragraph 4 supra took place on July 19, 1985. Although he accurately states

that I had told him that the ORC motion and brief had been filed earlier on the day of the conversation, the conversation and filing both occurred on July 26, 1985, the filing having taken place at about noon and the telephone conversation in the mid-afternoon.

6. I spoke for the first time with Thomas Geiser on July 26, 1985, after the conversation with Mr. Baer referred to above. We did not discuss ORC's position or papers, or the views of respondents. Mr. Geiser, at my request, simply confirmed that while a member of Mr. Baer's law firm, he had worked on the case in its early stages.

7. I have shared no information concerning ORC's position with any other lawyer of EBB&G and have received no information, beyond that

contained in their petition itself, from anyone purporting to have represented respondents at anytime.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and accurate.

Henry Rose

Henry Rose
Epstein Becker Borsody
& Green, P.C.
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Washington, D. C. 20036-6601
(202) 861-0900

Dated: August 23, 1985

City of Washington)
) ss:
District of Columbia)

I, Diana L. Richardson, a Notary Public, hereby certify that on the 23rd day of August, 1985, there personally appeared before me Henry Rose, who acknowledged signing the foregoing document and that the statements contained therein are true.

Diana L. Richardson
Notary Public

DIANA L. RICHARDSON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires November 14, 1988